

**DOCKET NO. 598321**

IN RE ORIGINAL APPLICATION OF	§	BEFORE THE TEXAS
NOUVEAU ENTERTAINMENT INC.	§	
D/B/A AXIS	§	
MB - MIXED BEVERAGE PERMIT	§	ALCOHOLIC
LB -MIXED BEVERAGE LATE HOURS	§	
PERMIT	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-3391)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 23rd day of July, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Pacey. The hearing convened on August 27, 2002, and the record was closed on January 20, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 20, 2003. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions to the proposal were filed by the Petitioner and Applicant.

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

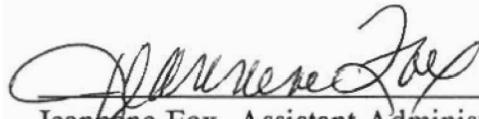
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the **original applications for a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit are hereby DENIED.**

This Order will become final and enforceable on August 13, 2003, unless a Motion for Rehearing is filed before that date.

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

**WITNESS MY HAND AND SEAL OF OFFICE** on this the 23<sup>rd</sup> day of July, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Stephen J. Pacey  
Administrative Law Judge  
State Office of Administrative Hearings  
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**SOAH DOCKET NO. 458-02-3391**

<b>NOUVEAU ENTERTAINMENT INC.</b>	§	
<b>D/B/A AXIS</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>TRAVIS COUNTY, TEXAS</b>	§	
	§	
	§	<b>OF</b>
<b>PERMIT APPLICATION FILED WITH</b>	§	
<b>THE TEXAS ALCOHOLIC BEVERAGE</b>	§	
<b>COMMISSION (CASE NO. 598231)</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

Nouveau Entertainment Inc., d/b/a Axis (Applicant or Mr. Yassine) filed an original application for a retailer's mixed beverage permit and mixed beverage late hours permit with the Texas Alcoholic Beverage Commission (TABC). TABC protested the issuance of the application asserting that the manner of operation at other licenced premises is detrimental to public safety and that the proposed location has an inordinate number of calls for police assistance. TABC contended that either of these assertions warrants the refusal of the permits. Applicant contended that the proposed place of business is not subject to an inordinate number of calls for police assistance and that Applicant's manner of operating other licenced premises is not detrimental to public safety. Based on the evidence received, the Administrative Law Judge (ALJ) recommends the application should be denied.

**I. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE**

After TABC referred the matter to the State Office of Administrative Hearings (SOAH), ALJ Stephen J. Pacey convened the hearing at the William P. Clements Building, 300 West Fifteenth Street, Austin, Texas on August 27, 28, and 29, 2002. Attorney Dewey A. Brackin represented the TABC staff (Staff), and Attorneys Don E. Walden and H. Allen Hill, Jr. represented Applicant. The hearing notice and jurisdiction were not contested issues, as reflected in the proposed findings of fact and conclusions of law. After evidence was received, the hearing was recessed to permit the parties an opportunity to file written closing arguments and legal briefs. The record was closed on November 15, 2002, and reopened December 16, 2002, in order to allow additional briefing. The record closed January 20, 2003.

**II. DISCUSSION**

**A. Introduction**

Applicant is a domestic business corporation which applied for a retailer's mixed beverage permit and a mixed beverage late hours permit for the premises at 422-24 East Sixth Street, Austin, Travis County, Texas. Hadi Ali Yassine is Applicant's president and sole stockholder. Mr. Yassine owns and manages Krome at Platinum (Krome) another club on East Sixth Street. Mr Yassine and Applicant may be used interchangeably in this proposal

After Applicant applied for the permits, the TABC protested the applications. In its hearing notice, Staff alleged that the place and manner in which Applicant conducts its business warrants the refusal of the permits based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency. Specifically, Staff alleged that Mr. Yassine's manner of operation at Krome is detrimental to the public safety, and the proposed Axis location is subject to an inordinate number of calls for police assistance.

Staff's assertions paraphrase the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN (Code). § 11.61(b)(7). According to case law,<sup>1</sup> Code interpretation requires evidentiary inspection of both place and manner. Place applies to club Axis' physical location while manner applies to the Applicant's history of operation at the leased premises or at another leased premises. Staff's allegations refer to both as justification for permit denial. Staff also maintained denial is justified because Applicant falsified answers on its permit application. Each of these items will be addressed separately.<sup>2</sup> The discussion will include both parties' arguments and evidence, and the ALJ's analysis.

## **B. Proposed Place of Business**

### **1. Staff's Assertions and Evidence.**

Staff argued that Axis' proposed location was the site of three previous clubs, two of which received many police reports. Staff produced Tim Humphrey's, Agent IV, TABC, statement<sup>3</sup> that indicated that the proposed Axis location, 422-24 East 6<sup>th</sup> Street, Austin, Texas, had twenty-five police reports filed from January 1, 2001, to September 30, 2001. Agent Humphrey recommended that Applicant's application be denied. Staff also produced Stanley L. Knee's, Chief of Police, affidavit<sup>4</sup> that noted that because of the excessive number of alcohol violations involving minors, the Austin Police Department insists that it is in the best interest of the community that Axis be denied a permit to sell alcoholic beverages. The affidavit also noted that between January 1, 2001, and September 30, 2001, there were 22 calls for police assistance, resulting in 25 police reports.

Austin Police Officer Desiree Small testified that three clubs, Spirits, Miranda's and the Loft, had previously been tenants at the proposed Axis location. Spirits and the Loft were under twenty-

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<sup>1</sup> *Texas Alcoholic Beverage Commission v. Carlos Sanchez d/b/a Tierra Caliente Bar and Grill* No. 03-01-00642-CV 2002 Tex. Appellant (Austin October 17, 2002, n.w.h.)

<sup>2</sup> In addition to general information concerning the number of police reports and arrests, Staff specifically asserted eight distinct incidences occurring at Krome that Staff alleged constituted criminal negligence. Each of these will be discussed separately as well as three specific allegations of falsification.

<sup>3</sup> Exhibit 14.

<sup>4</sup> Exhibit 15.

one clubs. Officer Small characterized Spirits as a problem bar and testified that as the Loft, the Austin Police Department (APD) reported problems with minors possessing alcohol.<sup>5</sup> She indicated that the location has been a problem for the APD whenever it was operated as an under twenty-one club. Officer Small further asserted that when the location was operated as Spirits, APD reported a shooting, a stabbing, and assaults on officers. The Staff concluded that because of the inordinate number of calls for police assistance to the previous clubs at the proposed Axis location, the proposed location warrants a refusal of the permit. This refusal is based on the general welfare, health, peace, morals and safety of the people and the public sense of decency.

## **2. Applicant's Assertions and Evidence.**

Applicant asserted that TABC is singling it out because the lone stockholder of Nouveau Entertainment, Inc., is Hadi Yassine who owns Krome another dance club. Applicant argued that there is nothing wrong with Axis' proposed location. Only three months before TABC's protest of the application, an APD report dated September 9, 2001, indicated that a check of the application was made by APD, and the check indicated that the APD had no objection to the issuance of the permits at that time.<sup>6</sup> As eventually happened in this protest, TABC usually protests if APD requests them to protest.

Applicant argued that no evidence indicates that 422-24 East Sixth Street is subject to an inordinate amount of calls for police assistance. According to Applicant, proof of this allegation would require, at a minimum, evidence that significantly greater number of calls for police assistance occur at 422-24 East Sixth Street than at the numerous other licensed businesses in the Sixth Street and surrounding area. Applicant claimed that the record contains no evidence that could possibly lead to this conclusion. In fact it argued, the unanimous weight of the evidence shows that the protesting parties have no objection to the issuance of an alcoholic beverage permit at 422-24 East Sixth Street. Applicant noted that when pressed during cross-examination for an explanation of her objection to this location, Officer Small admitted that "I really don't think I have a problem with there being a bar there."<sup>7</sup> Applicant noted that when asked by the ALJ what makes this location different from any other location on Sixth Street, Officer Small said:

I'm not so sure if it's the definition of the location, like the address, 442 [sic]. Is that address itself, the block number, does it create a situation? -No, it doesn't. It's the actual - the way the club is and was designed that contributed to a lot of problems,

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<sup>5</sup> An under twenty-one club is one that allows patrons eighteen and over on the premises, but only those twenty-one and over may purchase alcohol. They typically stay open past the two o'clock hour, but stop serving alcohol. These clubs are sometimes referred to as dance clubs.

<sup>6</sup> Respondent's Exhibit 4.

<sup>7</sup> Tr. Vol. II, page 78, lines 1, 2, and 3.

actually the club itself, not the actual place that it sits on Sixth Street or any of those

Applicant argued that similarly, TABC Lt. David Ferrero admitted that the location of Respondent's proposed business is not objectionable. When questioned whether he truly objected to the location, Lt. Ferrero testified as follows:

If somebody is coming in there like Terry did and presents the business plan like he did and has the track record like he did, yeah, we're not going to protest that. There's no reason to protest that. Somebody could obtain an alcohol permit at that location.<sup>9</sup>

Applicant further asserted that Vivian Joseph, who is one of the owners of the building at 422-24 East Sixth Street, testified that TABC Capt. David Ball repeatedly assured her that the TABC has no problem with the location of her building. Applicant concluded that the unanimous testimony of Officer Small, Lt. Ferrero, and Ms. Joseph proved that the place of Respondent's business does not warrant the refusal of the permit based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency.

### 3. Analysis.

During the course of the hearing, it became evident that TABC and APD did not have a problem with the physical location of the proposed club. Their problem is with Hadi Yassine operating a dance club at that location. Lt. Ferrero's testimony epitomizes their philosophy when he said "somebody could obtain an alcohol permit at that location." Staff's evidence of problems at the location when it was operated as Spirits, begs the question. The location was approved for two clubs after Spirits, one of which was a dance club. It is not logical to assume that now it has become a dangerous location for a permit. In September, 2001, APD, after reviewing the application, indicated that there was no objection to the issuing a permit at that location.

Officer Small indicated that the location was no more dangerous than any other location on 6<sup>th</sup> Street. She indicated that the two story construction could cause problems, but in a meeting with Applicant, after inspecting the reconstructed club, she indicated that she liked the new design of the club because it was open and well lighted.<sup>10</sup> Considering the evidence, the proposed Axis physical location is not a viable reason to deny the permit application.

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<sup>8</sup> Tr. Vol. II page 79, lines 14-21.

<sup>9</sup> Tr. Vol. II, page 139, line 25 through page 140, line 5.

<sup>10</sup> Tr. Vol. II, page 54, lines 19-22.

## **C. Manner of Operations.**

### **1. Background.**

In order to discuss the manner of operations, some background must be given. As mentioned before, Hadi Yassine owns 100 percent of Applicant's stock. Mr. Yassine also owns and operates Krome, which is also located on 6<sup>th</sup> Street. Staff asserted that Mr. Yassine's operation of Krome can be used to evaluate how he is likely to operate the proposed Axis premises.

Krome is a dance club which allows for anyone over eighteen to be admitted. Only those patrons twenty-one and over are authorized by law to purchase alcoholic beverages. Mr. Yassine tries to control the underage drinking by a system of wristbands and hand stamps. The patrons' identification is supposed to be checked by the doorman, who gives wristbands to those twenty-one and over, and places a large PX stamp on the back of the hand of those patrons under twenty-one. Mr. Yassine also retains "bouncers", who look for underage drinkers. TABC has a number of specific allegations against Krome that Staff asserted proved Mr. Yassine's manner of operation warrants refusal of Axis' application. Staff also indicated some general allegations warranted refusal.

Applicant raised some affirmative defenses that must be considered prior to consideration of Staff's allegations concerning manner of operation. Each of the defenses will be considered individually.

### **2. The Applicant Has Not Operated Other Premises.**

#### **A. Applicant's assertions.**

Applicant asserted that the TABC's allegation that "Applicant's manner of operation at other licensed premises is detrimental to the public safety," is not correct. Applicant noted that the Applicant in this proceeding is Nouveau Entertainment, Inc., which has never held an alcoholic beverage permit, and although Hadi Yassine owns the stock of Nouveau Entertainment, the corporation and Mr. Yassine are two separate legal entities. It argued that Staff's unstated assertion that Mr. Yassine is one and the same as Nouveau Entertainment ignores this elementary principle of corporate law. Applicant concluded that no statute, rule or other theory of law supports the Commission's refusal to treat Nouveau Entertainment, Inc. as an entity separate from Hadi Yassine, and Staff's effort to treat them interchangeably should be rejected.

#### **B. Staff's assertions.**

Staff argued that the evidence reflects that the Applicant corporation is wholly owned and operated by Hadi Ali Yassine, who also holds a Mixed Beverage Permit issued by the Commission for the premises known as Platinum X, also located on 6<sup>th</sup> Street in Austin, Texas. Staff asserted that

many of the allegations occurred on the premises of Platinum X and rationally relate to Applicant's ability to operate this new proposed premises in a manner conducive to compliance with the law.

### **C. Analysis.**

Applicant's hyper-technical argument ignores the obvious. It is obvious that the corporation is not going to manage or operate the day to day activities of the proposed club. Mr. Yassine would be operating the club; therefore, it is reasonable to compare his Krome operations. While it is true that the corporation and Mr. Yassine are separate legal entities, the ALJ does not believe it is the legislatures's intent to allow a person to incorporate as sole stockholder, and in so doing, totally insulate the person from any past activities.

### **3. Seller-Server Defense.**

#### **1. Applicant's Assertions.**

Applicant argued that many of the specific allegations were that Krome employees permitted minors to possess alcoholic beverages.<sup>11</sup> Applicant noted that although the Commission did not consider it prior filing or prosecuting this case, Code section 106.14(a) creates a "safe harbor" for businesses that ensure that their employees obtain TABC-approved training in the prevention of service of alcohol to minors and intoxicated persons. That section provides the following:

- (a) For purposes of this chapter and any other provision of this code relating to the sales, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person, the actions of an employee shall not be attributable to the employer if:
  - (1) the employer requires its employees to attend a commission-approved seller training program;
  - (2) the employee has actually attended such a training program; and
  - (3) the employer has not directly or indirectly encouraged the employee to violate such law.

Applicant asserted that it met all of the requirements of Code section 106.14(a). Under subsection(a)(1), Krome must require its employees to attend commission-approved seller training programs. To implement this requirement, the Commission has adopted a rule providing that the employer requires each employee to become certified within 30 days of his/her initial date of

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<sup>11</sup> Staff chose to use the specific violations in Docket No. 458-02-3719. This is a separate case that seeks to revoke Mr. Yassine's license at Krome for those specific violations. Staff argued that Mr. Yassine's operation at Krome reflects the type of operation that he would run, if the Axis' application was granted.

employment.<sup>12</sup> Applicant claimed the great weight of the evidence proves that Krome complied with this.

All witnesses who addressed the topic testified that Krome requires all employees to become certified within 30 days of their beginning employment, and that an employee who fails to do so loses his/her job.<sup>13</sup> Neither TABC nor APD investigated to determine whether Krome requires its employees to attend seller training programs. Carl Speed, security manager for Krome, testified that he has offered to police officers the documentation showing that all employees are certified, but the officers told Mr. Speed that they were not interested because they could get the information off their computer database.<sup>14</sup> Applicant claimed that Staff introduced no evidence of any kind to show that any employee of Krome was not certified, and it completely satisfied the first element of the Code.

The second element of Code section 106.14(a)(2), requires that the employee whose conduct is at issue be actually certified on the date of the incident in question. Applicant asserted that each Krome employee who allegedly served alcohol to a minor was certified by a commission-approved seller-training program.

The last element, Code section 106.14(a)(3), requires that Krome not directly or indirectly encourage violations of the law by its employees. Applicant produced several employees who testified as to operations at Krome. Benjamin Dotto, a bartender at Krome, testified that he had worked at Krome for two years, and currently was a bartender. Mr. Dotto indicated that he was TABC certified when he was first hired or 30 days thereafter, and that he signed a pledge concerning rules and policies relating to the operation of the club. He claimed that the management scheduled regular meetings to discuss operating policies and how to deal with minors who might be in the club. Mr. Dotto testified that he and the rest of the employees are required to attend regular meetings where they discuss, among other things, minors and how to deal with minors who are not abiding by the club rules.<sup>15</sup>

Mr. Speed, the floor manager and head of security at Krome, also testified concerning operations at the club. Mr. Speed testified that monthly meetings are held to discuss the proper and lawful service of alcoholic beverages, and that all employees are required to sign statement of club policy prohibiting service of alcoholic beverages to minors. He indicated that the policies are posted in plain view of employees, adjacent to employee time cards that employees use to record time on

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<sup>12</sup> 16 Tex. Admin. CODE §50.10(b).

<sup>13</sup> Tr., vol. II page 274, lines 12-17 (Maldonado direct); vol. III, page 19, lines 10-15 and page 34, lines 3-9 (Speed direct).

<sup>14</sup> Tr. vol. III, page 42, lines 11-17 (Speed redirect).

<sup>15</sup> Tr. vol. III, page 8, lines 13-25

the job. Mr. Speed also said that Krome's policy toward employees who serve alcoholic beverages to minors is "zero tolerance."<sup>16</sup> If an employee serves alcohol to a minor, he is fired.

Applicant also presented Edward Maldonado, a juvenile probation officer, who worked for Krome for eight months to a year. Mr. Maldonado also testified that he was TABC certified, and that Krome had meetings twice a month to talk about minors. Mr Maldonado said that his main duty was to walk the club floor looking for minors who might be drinking alcoholic beverages. He explained that once a minor was detected, the minor would be escorted out of the club. Mr. Maldonado also testified he monitored the restroom to watch for minors who might be washing off their stamps.<sup>17</sup>

David Cicchelli, a certified peace officer, works as a bartender at Krome. Mr. Cicchelli testified that he was TABC certified; that he signed a policy agreement; and that the club had regular policy discussion meetings. He also asserted that the club had a zero tolerance policy concerning minor drinking, and that the operation did not encourage minors drinking.<sup>18</sup>

Applicant argued that in stark contrast to its evidence, TABC introduced no evidence even remotely suggesting that Hadi Yassine directly or indirectly encourages violations of the law. According to the Applicant, the great weight of evidence proves that Mr. Yassine satisfies §106.14(a)(3). Applicant concluded that no action of a Krome employee who allegedly served an alcoholic beverage to a minor in violation of Section 106.13(a) can be attributed to Hadi Yassine.

#### B. Staff's assertions.

Staff argued that while there was attestation from the Applicant and his staff that it required its employees to attend the training program, there was insufficient evidence in the form of employee quarterly reports, personnel records, and/or certification cards which would meet Applicant's burden of proof to show that, in fact, all its employees were required to attend the training programs. Staff asserted that Applicant encouraged minors to violate the Code by verbally warning the patrons when the APD was coming.

Staff cited *Pena v. Neal* 901 S.W.2d 661 (Tex. App.-San Antonio 1995, no writ) for the proposition that an employer must do more than simply require attendance at the training programs. It cannot turn its back on all actions of trained seller-employees, safe in the assumption that if employee violations occur, recovery will be barred.

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<sup>16</sup> Tr., vol. III, page 33, lines. 15-18.

<sup>17</sup> Tr. Vol. II, page 273, lines 5-25, and page 274, lines 12-25.

<sup>18</sup> Tr. Vol. II, page 261, lines 4-24.

### C. Analysis.

The ALJ believes that there was ample evidence from Mr. Speed and other employees that all Krome employees were TABC certified. Applicant was correct in asserting that the TABC did not offer any rebuttal evidence to the contrary, considering APD has this information in its database.<sup>19</sup> Mr. Yassine went well beyond the requirements of ensuring his employees were TABC certified. He had each employee sign policy statement and posted the rules on the wall. He also had monthly meetings to discuss methods to control minors drinking alcoholic beverages. I believe that Mr. Yassine's manner of operation exceeded the first two requirements of Code section 106.14(a).

The ALJ does not concur with Staff's argument that the warning of police presence on the premises indicated indirect encouragement to minors to break the law. It is too big a leap in logic to assume the bar was knowingly selling to minors before the police were on the premise. It is easier to assume at most that the employees would desire be more careful, when the police were on the premises. The evidence does not indicate that Mr. Yassine directly encouraged minors to violate the law.

Mr. Yassine overcame all the hurdles of the Code except for one, indirect encouragement. Although Mr. Yassine may not have thought of it, his primary defense against minors drinking alcoholic beverages was flawed. The system of wrist bands for those patrons twenty-one and over and stamps for those patrons under twenty-one, is less than effective. The ALJ agrees with Officer Eric Hoduski's assessment. Officer Hoduski said that the wristbands have no value.<sup>20</sup> Officer Hoduski, when asked if it was not a good idea to have wristband and marks on the hand to help those inside the club determine who is a minor and who is not, answered that from an owner's perspective it might be a good idea, but if I was the bartender, they would not mean much. He went on to say that checking identification is the best system.<sup>21</sup>

Mr. Yassine acknowledged that his wristband system did not work by hiring employees to check the club for minors drinking. Applicant's own witnesses admitted that minors were in the club drinking alcoholic beverages. Mr. Maldado indicated that his primary job duty was to check the club premises for minors drinking alcoholic beverages. He also indicated that he would periodically check the restroom to make sure that no minor was washing off the stamp. Mr. Speed noted that a minor drinking alcoholic beverages would be escorted out of the club. APD conducted three "sting" operations where youthful looking minors were able to purchase beer at Krome.

The ALJ realizes that a bartender requesting identification of youthful appearing people in a busy club may be time consuming, but it is the only certain way (absent a fake ID) to determine

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<sup>19</sup> Tr. Vol. III, page 42, lines 14-17.

<sup>20</sup> Tr. Vol. 1, page 189, line 189.

<sup>21</sup> Tr. Vol. I, page 192, lines 1-9.

a person's age. Mr. Yassine's system may be a convenient or efficient way to conduct his business, but it is less than effective in preventing underage drinking. The ALJ concludes that Mr. Yassine's adoption of the wristband and stamp system indirectly encourages minors to violate the law. Consequently, the operation at Krome does not qualify under the "safe harbor" statute, and the actions of an employee shall be attributable to Mr. Yassine.

#### **4. Specific Allegations of Criminal Negligence<sup>22</sup>**

##### **A. Criminal Negligence.**

Five of Staff's specific allegations involve Mr. Yassine's alleged criminal negligence. Code section 106.13(a) provides that TABC may suspend a permit if it is found that the licensee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to consume or possess alcohol on the licensed premises.

Under Section 106.13(a), it is insufficient to show merely that an employee served an alcoholic beverage to a minor. Rather, that section requires proof that the employee was criminally negligent in serving a minor. The Alcoholic Beverage Code incorporates the definition of "criminal negligence" contained in TEX. PENAL CODE (Penal Code) §6.03(d) which reads as follows:

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

##### **B. Allegation I.**

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about December 20, 2001, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage on the premises. By permitting a minor employee to possess or consume an alcoholic beverage on the premises, Permittee violated Code §106.13(a).

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<sup>22</sup> TABC alleged that the manner in which Applicant conducts its business warrants refusal of the permit. Mr. Yassine owns Krome at Platinum, and TABC is using his operations at Krome as examples of the manner in which Mr. Yassine conducts his business. Consequently, these specific allegations are the same as those in SOAH Docket No. 458-02-3719, styled *Texas Alcoholic Beverage Commission v. Hadi Ali Yassine, d/b/a Krome at Platinum*, where TABC is seeking to revoke Mr. Yassine's permit.

## 1. Staff's evidence.

Robert McGowen is an APD sergeant and the head of the Street Response Unit (Unit). This unit covers Sixth Street, the warehouse district, and the University of Texas general areas, and it is responsible for alcohol and narcotics violations. On the evening of December 20, 2001, Sergeant McGowen was working undercover in the Krome Club, when an employee, who he described as a "shot girl" approached him and asked him if he would like to purchase a shot, which he declined. According to Sergeant McGowen, she then said it was slow that night, and he could buy himself and her a shot that they could drink together. When Sergeant McGowen declined, she went downstairs where Sergeant McGowan observed her talk two other patrons. Sergeant McGowen then observed her give each patron a shot, and observed the patrons gave her money. According to Sergeant McGowen, she and the patrons each drank a shot. He testified that he determined it was alcohol by smelling the empty containers.<sup>23</sup>

## 2. Applicant Assertions.

Applicant argued that TABC's evidence in support of this allegation consists exclusively of the testimony of Officer McGowen, who testified that he saw Samantha Davis, an employee of Krome, consume an alcoholic beverage. Applicant pointed out that Officer McGowen admitted that no other person was involved in this incident, and that Ms. Davis' solitary act of possessing the alcoholic beverage, by itself, constitutes "permitting a minor to possess an alcoholic beverage" by Ms. Davis.<sup>24</sup>

In Applicant's opinion, the plain language of the Code makes clear that the Legislature chose not to authorize punishment of a permittee if an underage employee merely possesses an alcoholic beverage. Rather, Applicant argued, Commission action is authorized only if an employee permits another person to do so. Code section 104.01(9), prohibiting certain conduct regarding narcotics, demonstrates the Legislature's distinction. According to Applicant, the Commission may sanction a permittee if the permittee either (a) possesses a narcotic, or (2) permits another person to possess a narcotic, and these two alternatives describe two distinctly different acts that each justify Commission action. In contrast, Applicant asserted, neither Code section 106.13(a) nor any other section of the Code authorizes the Commission to sanction a permittee if its underage employee merely possesses (as distinguished from permitting another person to possess) an alcoholic beverage.

Applicant asserted that section 106.09(c) of the Code explicitly authorizes the holder of a mixed beverage permit (such as Krome) to employ 18- through 20-year-olds to sell, prepare and serve mixed beverages. In addition, according to Applicant, section 106.05(b)(1) states that "[a]

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<sup>23</sup> Tr. Vol. I, page 206, lines 12-25 and page 207, lines 1 and 2

<sup>24</sup> Tr. Vol. I, page 214, line 25 through page 211, line 4.

minor may possess an alcoholic beverage while in the course and scope of the minor's employment if the minor is an employee of a licensee or permittee and the employment is not prohibited by this code[.]”

### 3. Analysis.

Staff's argument, that Mr. Yassine was criminally negligent by allowing a minor to possess alcohol on the premises, fails. The ALJ certainly agrees with Applicant's second argument that the possession was lawful. The Code implicitly provides that a holder of a mixed beverage permit may employ a person over 18 to sell, prepare, serve or otherwise handle liquor. The Code explicitly provides an exception. Code section 106.05 says in pertinent part:

(b) A minor may possess and alcoholic beverage:

(2) while in the course and scope of his employment if he is an employee of a licensee or permittee and the employment is prohibited by this code.

Applicant did not violate Code Section 106.13(a) as it pertains to possession.

Code section 106.13(a) also applies to consumption, and Sergeant McGowen testified that he observed Ms. Davis consume an alcoholic beverage. Staff did not indicate how Mr. Yassine was criminally negligent<sup>25</sup> in allowing a minor to consume alcohol on the premises. The test is set forth in *Edmonson v. State*, 955 S.W.2d 472 (Tex.-App.-Austin 1997, no writ) which states:

A person is criminally negligent who fails to perceive a specific risk and whose failure constitutes a gross deviation from the standard of care that an ordinary person would exercise under the circumstances.

The ALJ does not believe that Mr. Yassine or an ordinary person could have reasonably perceived that his employee would have someone buy her a drink and then consume that drink. Mr. Speed indicated that the club had zero tolerance. When asked what that meant, he said that if they drink underage, if they are drinking on the job, or if they serve to a minor, they are fired.<sup>26</sup> The club had policies in place to prevent this type of behavior. The ALJ concludes that Staff failed to prove Allegation I that Mr. Yassine was not criminally negligent in permitting a minor to consume or possess alcohol on Krome's premises.

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<sup>25</sup> Except generically, Staff did not explain how criminal negligence was involved in any of the specific allegations nor did Staff explain their argument as to each specific allegation. The ALJ assumes that the Staff believes that the evidence speaks for itself. It would have been helpful for Staff to describe the facts that they consider support each individual allegation.

<sup>26</sup> Tr. Vol. III, page 33, line 3 and 18-25.

### **C. Allegation II.**

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about December 20, 2001, solicited or permitted solicitation of alcoholic beverages for consumption by the permittee or his agent, servant or employee. By soliciting or permitting the solicitation of alcoholic beverages for consumption, Permittee violated Code §104.01(4).

#### 1. Staff's Evidence

Staff's evidence is the same as Allegation I. Sergeant McGowan testified that Ms. Davis told him it was slow night, and she asked him to buy a shot for himself and her, so they could drink the shots together.

#### 2. Applicant's Assertions.

Applicant argued that there was no evidence suggesting that Ms. Davis acted with knowledge or encouragement of Mr. Yassine, or any other Krome employee. Although the standard practice of Krome is to terminate the employment of an employee who violates the law, the record demonstrates that Ms. Davis' employment was not immediately terminated, because charges against her were dismissed the next day.

#### 3. Analysis.

This is not a criminal negligence allegation, therefore a distinction must be made. The distinction between Code section 104.01 and Code section 106.13 is discussed in the *Bradley v. Liquor Control Board*, 108 S.W.2d 300 (Tex. Civ. App.-Austin 1937, no writ) and *Wishnow v. Texas Alcoholic Beverage Commission*, 757S.W.2d 404 (Tex. App.- Hous. (14 Dist.) 1988) cases. The distinction is that Code section 104.01 is a strict liability section (as Staff calls it) and Code section 106.13 is not. The court in *Bradley* stated in pertinent part:

A licensee or permittee is responsible for the acts of his agent, employee, or servant, which violates the terms of the license or permit, even though the acts are against the instructions of the licensee or permittee.

The ALJ concludes that Staff proved Allegation II because Applicant violated Code section 104.13. and that Mr. Yassine permitted Ms Davis to solicit drinks on Krome's premises.

### **D. Allegation III.**

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about February 15, 2002, with criminal negligence, permitted a minor to possess or consume an

alcoholic beverage on the premises. By permitting a minor to possess or consume an alcoholic beverage on the premises, Permittee violated Code §106.13 (a).

### 1. Staff's Evidence and Assertions

Eric Holuski was in Krome in an undercover capacity when he observed three youthful appearing patrons walk up to the bar. The bartender, Kimberley Davis, served the three patrons two mixed drinks and two beers.<sup>27</sup> All three of the individuals were wearing wrist bands that indicated they were twenty-one or over. Ms. Davis did not ask for any identification. As Officer Holuski and Sergeant McGowan proceeded downstairs to check the patrons identification, they observed a "shot girl" serve three more drinks to the minors without checking their identification.<sup>28</sup> Officer Holuski identified all three as minors, and identified the drinks as alcoholic beverages by smelling them.

Staff asserted that Applicant's bartenders knew or should have know that minors will attempt numerous, and sometimes illegal, means to obtain alcoholic beverages, including exchanging or altering identification tags. According to Staff, wearing an adult wrist band does not relieve a bartender of the responsibility of identifying a youthful-appearing person to determine the person's age on a case-by-case basis. In Staff's opinion, Applicant's wristband and stamping system cannot wholly protect against the possibility that the individual wearing a wristband is actually a minor. Staff asserted that the system cannot relieve employees of responsibility of ensuring minors are not served alcoholic beverages. Staff argued that it is incumbent upon the permittee and its employees to take all necessary steps (especially "carding" individuals at the point of sale) to ensure minors are not served. Failure to do so, as in this case, is a gross deviation from the standard of care of a reasonably prudent bartender in the same or similar circumstance, and thus constitutes criminal negligence.

### 2. Applicant's Assertions.

Applicant argues that under Code section 106.13(a), it is insufficient to show merely that an employee served an alcoholic beverage to a minor. Rather, that section requires proof that the employee was *criminally negligent* in serving a minor. Applicant asserted that under Code section 106.13(a) it is insufficient to show merely that an employee served an alcoholic beverage to a minor. Consequently, the issue here is not simply whether Ms. Davis served an alcoholic beverage to the underage patrons, but whether her decision to not request identification, together with the presence of wristbands on the patrons, constitutes criminal negligence.

Applicant asserted that TABC believed that Ms. Davis was criminally negligent in spite of the fact that all three patrons wore wristbands indicating that they were twenty-one years of age or older. In Applicant's opinion, the only evidence of the three siblings' appearance consists of

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<sup>27</sup> Tr. Vol. I, page 177, lines 6-25.

<sup>28</sup> Tr. Vol. I, page 178, lines 8-15.

Exhibits 6, 7, and 8, which are photographs of the three patrons' driver's licenses, and Officer Hoduski's conclusory testimony that the three patrons "looked under the age." Applicant indicated that the photographs were not taken on the evening in question, and more importantly, did not reflect any physical characteristics that can reasonably lead to the conclusion that Ms. Davis was criminally negligent in serving alcohol to them. Applicant argued that when asked how the three Taylor siblings were dressed that evening, Officer Hoduski's response consisted of "pants and a shirt" for the two young men, and "I don't recall" for the young woman.<sup>29</sup> Nor was any evidence of the patrons' demeanor even mentioned at hearing. According to Applicant, there were no facts in evidence that lead to the conclusion that Ms. Davis was criminally negligent.

According to Applicant, TABC and APD simply apply a far more rigorous standard to service of alcohol to minors than does Section 106.13(a) of the Alcoholic Beverage Code. Applicant argued that if the Legislature wanted to authorize the Commission to punish a permittee any time a minor is served without being asking for identification, it could have easily done so. Applicant indicated that such a bright-line standard would be much simpler for TABC to enforce, and much simpler for businesses to comply with, but the Legislature chose not to adopt such a law. Instead, Applicant argued, it chose to give greater leeway to businesses by requiring the TABC to prove criminal negligence before the business may be sanctioned. Applicant concluded that failure to request identification did not, by itself, constitute criminal negligence, and the evidence did not support this allegation.

### 3. Analysis.

The ALJ agrees with Staff. The failure to check the three patrons identification constituted criminal negligence. As mentioned earlier, Mr. Yassine's wristband/stamp system of controlling underage drinking is flawed. The record is replete with references, even implicitly from Applicant's employee witnesses, where there are minors possessing and consuming alcoholic beverages.<sup>30</sup> Applicant is aware this is happening; he even has employees walking the premises looking for minors who may be drinking, and they testified about how the minors were escorted out of the club. Sergeant McGowan testified that at Krome he can find a minor drinking alcohol almost any night.

The risk Applicant failed to perceive is that minors can use his system to consume alcohol, and this is a gross deviation that an ordinary person would exercise under the circumstances. An ordinary person would check the identification of every person who appears fairly young. An ordinary person would not rely on a wristband to indicate the person was 21 or over. The ALJ is not blind to the facts that other clubs use this system, but the other clubs also have problems with minors

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<sup>29</sup> Tr. Vol. I, page 188, lines 12-18.

<sup>30</sup> APD officer Kacey Gabriel testified that he had been present at arrests or arrested fifty to one hundred people at Krome.

consuming alcohol.<sup>31</sup> An ordinary man would check identification, not a wrist band or a stamp. Mr. Yassine's employee, Ms. Davis, was criminally negligence when she sold alcoholic beverages to the three minors who were wearing wristbands.

### **E. Allegation IV.**

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about February 23, 2002, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage on the premises. By permitting a minor to possess or consume an alcoholic beverage on the premises, Permittee violated Code §106.13(a).

#### 1. Staff's Evidence<sup>32</sup>

APD Officer Kacey Gabriel testified that he was undercover on the second floor of Krome watching the disk jockey, who APD suspected was selling drugs to employees and patrons. He observed an employee, later identified as Stephen Nisbet, approach the disc jockey, and observed the disc jockey hand something to the Mr. Nesbit.<sup>33</sup> Officer Gabriel then went downstairs and informed Sergeant McGowen of his observations. Sergeant McGowen testified that he approached Mr. Nesbit and told him he was not under arrest, but Sergeant McGowen also told him he knew what he was doing. Mr. Nesbit pulled out a Visine bottle, and volunteered to Sergeant McGowen that it had rum in it. Sergeant McGowen indicated that at that time, he intended to arrest Mr. Nesbit for minor in possession. According to Sergeant McGowen, he kept questioning Mr. Nesbit who volunteered that he had cocaine in his billfold that he had gotten from the disc jockey. Sergeant McGowen said that he then arrested Mr. Nesbit.<sup>34</sup>

#### 2. Applicant's Assertions.

Applicant asserted that Staff's only evidence in support of this allegation is Officer McGowen's testimony that Stephen Nisbet, an employee, possessed a Visine bottle that, according to Mr. Nisbet, had rum in it. No other person was involved in the incident. Applicant argued that Officer McGowen admitted Mr. Nisbet's conduct "was an independent action on his part, so far as I know."<sup>35</sup> Applicant indicated that Officer McGowen described the incident as Mr. Nisbet "allowing himself to possess an alcoholic beverage."

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<sup>31</sup> Violations at numerous clubs were mentioned in the hearing.

<sup>32</sup> Staff's evidence is the same for allegations IV and V.

<sup>33</sup> Tr. Vol. I, page 116, lines 16-25 and page 117, lines 1 and 2.

<sup>34</sup> Tr. Vol. I, page 151, lines 4-25, and page 152, lines 1-25.

<sup>35</sup> Tr. Vol., page 160, lines 13-17.

According to Applicant, the facts alleged by Staff do not constitute a violation of Code section 106.13(a), for the same reason discussed under Allegation I. that the plain language of Section 106.13(a) prohibits Applicant (or an employee) from permitting a minor to possess an alcoholic beverage on the premises, but does not prohibit the mere possession of an alcoholic beverage by a minor. Applicant argued that this allegation should be ignored.

### 3. Analysis.

The ALJ agrees with Applicant's argument. The language in Code section 106.13<sup>36</sup> prohibits Applicant or its employee from permitting a minor to possess an alcoholic beverage on the premises, but does not prohibit the mere possession of an alcoholic beverage by a minor. Officer McGowen's argument that Mr. Nesbit allowed himself to possess an alcoholic beverage, is an attempt to turn what is in reality mere possession to criminal negligence. In addition, no ordinary person could have reasonably foreseen that an employee would possess alcohol in a Visine bottle. Staff needs to realize the difference between simple possession and criminal negligence. Code section 106.13(a) requires a person to perceive a specific risk whose failure constitutes a gross deviation from the standard of care of an ordinary person. Staff attempts to treat Code section 106.13(a) the same as Code section 104.01, which does not require the Staff to satisfy the test contained in the Code section 106.13. This will be further discussed in the analysis of Allegation V.

### F. Allegation V.

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about February 23, 2002, possessed or permitted others to possess a narcotic on the licensed premises. By permitting possessing or permitting others to possess a narcotic on the licensed premises, Permittee violated Code §104.01(9) and Rule 35.41(b).

#### 1. Staff's Assertions.

This allegation is based on the same facts as set out in Allegation IV. Staff asserted that Applicant violated Code section 104.01(9), which states in pertinent part:

No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(9) possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.

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<sup>36</sup> *Id* at page 12.

Staff indicated that 16 TEX. ADMIN. CODE ((TAC) §35.41 defines narcotics as any substance defined in the Texas Controlled Substance Act (Act), TEX. HEALTH & SAF. CODE ANN. § 481.002(5), (6), (7), or (26). Section 481.002(5) of the Act defines a controlled substance as a drug in Schedule I-V. Cocaine is listed in Schedule II of the Act.

According to Staff, it must show that possessor (1) exercised care, custody, control, and management of the narcotic, and (2) that the possessor knew the matter was contraband.<sup>37</sup> Staff pointed out that possession is the act of one who knowingly obtains or receives the thing possessed or is aware of its control of the thing for a sufficient time to permit it to terminate her control.<sup>38</sup> Furthermore Staff argued, the Code is a strict liability statute as to the acts of a permittee's employees. A permit may be denied for the unlawful acts of a employee as if they has been the acts of the permittee himself.<sup>39</sup>

Staff asserted that Code section 11.49 defines Premises as the grounds and all buildings, all vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

According to Staff, Sergeant McGowen's and Officer Gabriel's testimony reflected that disc jockey Bartlett handed employee Nesbitt a suspicious object which the officers suspected was drugs. Staff argued that when questioned Nesbitt admitted he was a minor in possession of an alcoholic beverage. While under arrest for minor in possession, cocaine was found in Nesbitt's possession pursuant to a valid search incident to arrest.

## 2. Applicant Assertions.

Applicant asserted that Staff claims that Brian Bartlett, a disc jockey for Krome, delivered cocaine to Mr. Nisbet. No evidence supports this allegation. Officer Kacey Gabriel observed Mr. Bartlett transfer to Mr. Nesbit a book that would hold CDs, and that he saw nothing that was later confirmed to be a narcotic transaction. Applicant indicate that Mr. Nisbet told Officer McGowen that he had cocaine in his wallet, and that he received it from Mr. Bartlett, but no evidence shows that any delivery of cocaine occurred on February 23, or more importantly, that it occurred on the licensed premises. According to Applicant, the criminal case was dismissed for lack of evidence Applicant concluded that the record does not support this allegation.

## 3. Analysis.

The distinction between Code section 104.01 and Code section 106.13 is discussed in the

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<sup>37</sup> *Martin v. State*, 753 S.W.2d 384, 387 (Tex.Crim.App. 1988).

<sup>38</sup> TEX. PENAL CODE ANN. § 6.01(b).

<sup>39</sup> *Bradley v. Liquor Control Board*, 108 S.W.2d 300 (Tex. Civ. App.-Austin 1937, no writ).

*Bradley v. Liquor Control Board*, 108 S.W.2d 300 (Tex. Civ. App.-Austin 1937, no writ) and *Wishnow v. Texas Alcoholic Beverage Commission*, 757 S.W.2d 404 (Tex. App.- Hous. (14 Dist.) 1988) cases. The distinction is that Code section 104.01 is a strict liability section (as Staff calls it) and Code section 106.13 is not. The court in *Bradley* stated in pertinent part:

A licensee or permittee is responsible for the acts of his agent, employee, or servant, which violate the terms of the license or permit, even though the acts are against the instructions of the licensee or permittee.

This distinction is the reason for deciding in Applicant's favor in Allegation IV, and concluding that Applicant violated Allegation V. Mr. Nesbit admitted he had cocaine in his billfold and that he obtained it from the Disk Jockey. The ALJ concludes that the Applicant violated Code section 104.13.

### G. Allegation VI.

Permittee, Hadi Ali Yassine, his agent, servant or employee, on or about March 15, 2002, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage on the premises. By permitting a minor to possess or consume an alcoholic beverage on the premises, Permittee violated Code §106.13(a).

#### 1. Staff's Evidence.

On March 15, 2002, Theresa Ray, who was eighteen years of age at the time, entered Krome's premises as part of a Sting Operation. Ms. Ray was accompanied by two undercover officer's. When she entered the premises the doorman placed a stamp on both hands that indicated she was under twenty-one. Ms. Ray testified that she walked up and ordered a Miller Lite, and the bartender, later identified as David Phillips, served her the Miller Lite. She then handed the beer to Officer Hoduski, who arrested David Phillips.

#### 2. Applicant Assertions.

Applicant asserted that this allegation involves a sting operation that included Theresa Ray, who testified that she purchased a Miller Lite beer at Krome on March 15, 2002. According to Applicant, Staff introduced no evidence whatsoever of Ms. Ray's appearance on that date. Instead, it introduced a driver's license with a photograph taken about ten months earlier, and a photograph taken two weeks after the incident. In Applicant's opinion, no evidence of any kind indicates that Miss Ray's demeanor, behavior, or clothing on March 15 would have suggested that she was a minor. Miss Ray herself admitted that the clothes in which she was dressed -- jeans and a T-shirt -- are like clothes worn by people of all ages.<sup>40</sup> Although Miss Ray testified to having the letters "PX" place on her hand, she also testified that Krome was crowded that evening. Crowded conditions

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<sup>40</sup> Tr. Vol. 1, page 101, lines 10-13

make it more difficult to observe and detect individual patrons. In short, no evidence proves criminal negligence by Mr. Yassine's employee in serving Ms. Ray.

### 3. Analysis

The ALJ concludes that Applicant was criminally negligent by violating Code section 106.13. Applicant was criminally negligent for the same reasons discussed in the analysis of Allegation III at page 15.

## **H. Allegation X<sup>41</sup>**

### 1. Staff's evidence.

On June 15, 2001, Mary Grass, who was a minor at the time, entered Krome's premises as part of a Sting Operation. Ms. Grass was accompanied by two undercover officer's, one of whom was Officer Hoduski. Officer Hoduski testified that Ms. Grass walked up and ordered a Bud Light, and the bartender, later identified as Jayson Mathewson, served her the Bud Light. She then handed the beer to Officer Hoduski and went to another bar to make another purchase, and the bartender would not serve her.

### 2 Applicant's Assertions.

Applicant asserted that, Officer Hoduski testified that Mary Grass, a minor, purchased a bottle of beer from Jason Matthewson, a bartender. Officer Hoduski testified that he could not recall whether Ms. Grass was asked for identification at the door, and couldn't recall whether employees placed any kind of marker on her hand to indicate that she was a minor. He further admitted that he did not know what Ms. Grass was wearing. Applicant concluded that in the absence of this kind of evidence, it is impossible to conclude that Mr. Matthewson was criminally negligent.

### 3. Analysis.

The ALJ concludes that Applicant was criminally negligent by violating Code section 106.13. Applicant was criminally negligent for the same reasons discussed in the analysis section of Allegation III at page 15.

## **D. Falsification**

The ALJ took official notice of the First Amended Notice of Hearing for SOAH Docket No. 458-02-3719 that included eleven specific allegations. Thus far, seven of these specific allegations have been discussed, and this section will refer to Allegations VI., VIII, and IX.

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<sup>41</sup> Allegations VII, VIII, and X deal with falsification of the application, which will be discussed in a later section.

These three allegations will not be considered in this proposal. In both the First Amended Notice of Hearing, and Staff's brief, Staff alleged in each allegation that "Permittee violated Code § 11.61 (b) (4)." The ALJ could consider these allegations, but any discussion would be irrelevant because this Code section does not apply to the application process. Code section 11.61 is entitled "Cancellation or Suspension of Permit."<sup>42</sup>

In addition, the language that Staff asserted is not the same language as that contained in Code section 11.61(a)(4). Each of Staff's allegations states in pertinent part:

Permittee, Hadi Ali Yassine, failed to answer or falsely or incorrectly answered a question in an original or renewal application

The Code states in pertinent part:

the permittee made a false or misleading statements in connection with his original renewal application.

The difference in the wording seems innocuous, but the proof involved in proving an incorrect statement compared to a false statement is entirely different. Incorrect simply entails a statement that is wrong regardless whether the person knew it or not. False means the person knew the statement was wrong. False Statement is defined in Blacks Law Dictionary, abridged Sixth Edition (West 1991) as:

[A] statement knowingly false or made recklessly without honest belief in its truth, and with a purpose to mislead or deceive.

The ALJ cannot discuss the allegations not only because the statute cited is wrong but also because the ALJ does not know what the allegation is trying to prove.

As stated above Code section 11.61 applies to actions that justify the cancellation of an original permit or renewal and not for a refusal of an application. Additionally, and for same reason, the ALJ will not consider Allegation XI because the statute cited is Code section 11.61(a)(7).

#### **E. Operating As A Twenty-One And Over Club.**

Applicant argued that the application should be granted because he will operate Axis as a twenty-one and over club.

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<sup>42</sup> It is possible that the appropriate statute is Code section 11.46 (a)(4), which is entitled "General Grounds for Refusal [of a permit]." The ALJ can not assume that Staff meant to allege a violation of Code section 11.46.

## 1. Applicants Assertions.

According to Applicant, the evidence shows that Applicant will not permit patrons under age 21 in the premises of Axis. Applicant indicated that Steve Fleckman (a prior attorney for Applicant) and Ms. Joseph each testified to this fact.<sup>43</sup> Ms. Joseph testimony is the following:

I have no reason to think that they will say one thing and do another, because he has not done that. He has done exactly what he said he would do. He also agreed to a 21 and over club, and I believe that that's what he will run.<sup>44</sup>

In Applicant's opinion, Officer McGowen said that this will eliminate the very concern that TABC and APD complain of at Krome, which, according to Officer McGowen, is that too many minors allegedly possess alcoholic beverages. Applicant asserted that Officer McGowen testified that Hadi Yassine's allowing patrons under age 21 into Platinum account for "probably about 95% of his problem."<sup>45</sup> During cross-examination, according to Applicant, Officer McGowen followed with the admission that if Mr. Yassine operates Axis as a twenty-one and over club, then "that would probably alleviate a lot of his problems, 95% of them."<sup>46</sup> Similarly, Ms. Joseph testified that Lt. Ferrero told her that "if [Mr. Yassine] were to agree to a 21 and over club, that he -- that he did not foresee any problems."<sup>47</sup> Applicant asserted that in contrast to all of this evidence, Staff introduced no evidence of any kind showing that Axis will not be operated as a twenty-one and over club. Applicant concluded that the evidence is undisputed that Axis would operate as a twenty-one and over club.

## 2. Analysis.

The ALJ agrees that the evidence indicates that if Axis was operated as a twenty-one and over club, most of the problems encountered at Krome would be alleviated. The preponderance of the evidence indicates that the Applicant is willing to operate Axis on a twenty-one and over basis. But, the ALJ does not know what the Applicant suggests the ALJ should propose. The ALJ can not issue a contingent Proposal for Decision, but the Applicant's problem is greater than this.

Applicant applied for a retailer's mixed beverage permit and a mixed beverage late hours permit. The issue is whether the application as it stands should be refused or granted. As long as

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<sup>43</sup> Tr. Vol II, page 196, lines 13-17 (Fleckman); VolII, page 220. lines 8-16 (Joseph).

<sup>44</sup> Tr. Vol. II. page 220, lines 9-13.

<sup>45</sup> Tr. Vol. II, page 218, line 25 and page 219, line 5.

<sup>46</sup> Tr. Vol. II, page221, line 6-14.

<sup>47</sup> Tr. Vol. II, page 205, lines 20-22.

it includes a mixed beverage late hours permit, there is no guarantee that it will be operated as over twenty-one club. Applicant should have thought of this in September when he filed the application. In December when the protest arose, Applicant could have amended the application or if that was not possible, withdrawn the application and refilled it. At this late juncture, the ALJ may only make a decision on the application as it exists.

#### **F. Conclusion.**

The ALJ has analyzed each issue individually; therefore there will be no further analysis in this section. The ALJ finds that there are sufficient violations at Krome to lead to a conclusion that Mr. Yassine's manner of operations is detrimental to public safety. Mr. Yassine's manner of operation at Krome indicates how Applicant would conduct his business at Axis, and that projected manner of operation warrants the refusal of the permit because it would be contrary to the general welfare, health, peace, morals, and safety of the people.<sup>48</sup>

### **III. PROPOSED FINDINGS OF FACT**

1. On December 10, 2001, Nouveau Entertainment Inc., d/b/a Axis (Applicant) filed an original application with the Texas Alcoholic Beverage Commission (TABC) for a retailer's mixed beverage permit and a mixed beverage late hours permit.
2. Axis' proposed location is 422-24 East Sixth Street, Austin, Travis County, Texas.
3. Hadi Yassine is Applicant's president and sole stockholder.
4. Mr. Yassine owns and manages Krome at Platinum (Krome) another club on East Sixth Street in Austin, Texas.
5. After protests were filed, TABC's staff requested a hearing at State Office of Administrative hearings (SOAH).
6. Staff sent Applicant a hearing notice on July 2, 2002, that informed Applicant of the issue to be decided, the right to appear and present evidence, the date and place of the hearing, and the statutes and rules involved.
7. Between January 1, 2000 and February 15, 2002, there were eighty four calls for police assistance from Krome, resulting in ninety seven police reports.

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<sup>48</sup> The ALJ did not conclude that Staff proved that the "place" of Axis' proposed location warranted refusal of the permit.

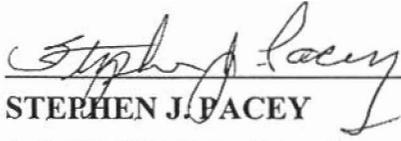
8. On December 20, 2001, Samantha Davis, an employee of Mr. Yassine asked Sergeant McGowen to buy her a drink.
9. Mr. Yassine's system of stamps for the patrons under twenty-one and wristbands for those twenty-one and over is not effective in preventing minors from drinking in Krome.
10. On February 15, 2002, Kimberley Davis, an employee of Mr. Yassine at Krome, sold alcoholic beverages to three minors wearing wristbands without checking the age of the patrons.
11. On February 23, 2002, Stephen Nesbit, an employee of Mr. Yassine, possessed cocaine on the premises of Krome.
12. On March 15, 2002, Theresa Ray, who was eighteen years old, purchased a beer from one of Krome's bartenders while having stamps on her hands that indicated she was a minor.
13. On June 15, 2001, Mary Grass, a minor, purchased a beer from one of Krome's bartenders without being asked for identification.

#### IV. PROPOSED CONCLUSIONS OF LAW

- The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter, pursuant to TEX. ALCO. BEV. CODE ANN. § 11.46.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law as provided by TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
  3. Service of proper and timely notice of the hearing was effected upon Applicant, as required by TEX. GOV'T CODE ANN. ch. 2001 and TEX. ALCO. BEV. CODE ANN. § 11.63.
  4. Mr. Yassine's manner of operation at Krome presents a danger to public safety, and this manner of operation is an indication of how Applicant would operate at Axis.
  5. As provided in TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8), TABC may deny an application if it finds reasonable grounds to believe that the manner in which the applicant may conduct its business warrants a refusal of a permit based on the general welfare, health, peace, and safety of the people.

6. Based on the foregoing findings of fact and conclusions of law, the application of Nouveau Entertainment, Inc. d/b/a Axis, Austin, Travis County, Texas, for mixed beverage and mixed beverage late hours permits should be denied.

**SIGNED this 20<sup>th</sup> day of March, 2003.**

  
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**STEPHEN J. FACEY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**