

DOCKET NO. 606226

IN RE LOIS MARIE MELVIN	§	BEFORE THE
D/B/A HOLD-EM-HIGH	§	
PERMIT/LICENSE NOS. MB525077,	§	TEXAS ALCOHOLIC
LB525078	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-2345)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 6th day of July, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge. The hearing convened on March 26, 2004, and adjourned on March 26, 2004. The Administrative Law Judge Robert Jones made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 22, 2004. This Proposal For Decision (attached hereto as Exhibit "A"), was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions were filed on May 7, 2004 and Petitioner filed a Response to the Exceptions on May 14, 2004.

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

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the above described permits and/or licenses are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on July 27, 2004, 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.

SIGNED on this 6th day of July, 2004, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert Jones
Administrative Law Judge
State Office of Administrative Hearings
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Fort Worth District Office

DOCKET NO. 458-04-2345

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

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BEFORE THE STATE OFFICE

VS.

OF

**LOIS MARIE MELVIN D/B/A
HOLD-EM-HIGH
TARRANT COUNTY, TEXAS
(TABC CASE NO. 606226)**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

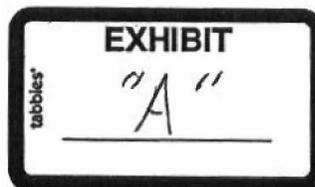
I. INTRODUCTION

The Staff of the Texas Alcoholic Beverage Commission (the Staff) sought cancellation of the permits held by Lois Marie Melvin d/b/a Hold-Em-High (Respondent) because of a breach of the peace which occurred on Respondent's licensed premises. The Administrative Law Judge (ALJ) recommends that Respondent's permits be canceled.

II. JURISDICTION AND PROCEDURAL HISTORY

On January 28, 2004, the Staff issued a Notice of Hearing scheduling a public hearing in this case for March 26, 2004. On that date, ALJ Robert F. Jones Jr. convened the hearing in the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. The Staff was represented by Timothy Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared in person and through counsel. The hearing was concluded on March 26, 2004, and the record closed on April 9, 2004, after the parties filed final written arguments.

Jurisdiction was not a contested issue. Adequacy of notice was contested.



III. DISCUSSION AND ANALYSIS

A. The Governing Law

The TABC may cancel or suspend Respondent's mixed beverage permits if it finds that (1) a breach of the peace¹ has occurred on the licensed premises, (2) that was not beyond Respondent's control, and (3) resulted from Respondent's improper supervision of persons permitted to be on the licensed premises.² The rules formulated by the TABC distinguish between a "simple" breach of the peace and an "aggravated" breach of the peace.³ A simple breach of the peace involves no serious bodily injury or use of a deadly weapon,⁴ an aggravated breach of the peace involves one or the other or both.⁵ Bodily injury means "physical pain, illness, or any impairment of physical condition."⁶ Serious bodily injury is bodily injury "that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."⁷ A deadly weapon can be "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury." It can also be "anything that in the manner of its use or intended use is capable of causing

¹ "Breach of the peace" is not defined in the Texas codes or statutes. The Code Construction Act directs that words are to be construed according to common usage. When they have a "a technical or particular meaning, whether by legislative definition or otherwise," they are to be construed by that special usage. TEX. GOV'T CODE ANN. § 311.011 (Vernon 2004). "Breach of the peace" is a generic legal term, and applies to a "violation or disturbance of the public tranquility or order." It is the "offense of breaking or disturbing the public peace by any riotous, forcible, or unlawful proceeding." *Black's Law Dictionary* (Rev. 4th Ed. 1968).

² TEX. ALCO. BEV. CODE ANN. (the Code) §§ 11.61(b)(2), 28.11 (Vernon 2004).

³ 16 TEX. ADMIN. CODE (TAC) § 37.60 (Standard Penalty Chart). The TABC is authorized to promulgate rules "necessary to carry out the provisions of" the Code. § 5.31 of the Code.

⁴ *Id.*

⁵ *Id.*

⁶ TEX. PENAL CODE ANN. § 1.07(a)(8) (Vernon 2004).

⁷ *Id.* § 1.07(a)(46).

Docket No. 458-04-2345

Proposal For Decision

Page 3

death or serious bodily injury.”⁸

The Staff recommended that Respondent’s permits be canceled.⁹ Generally the TABC must give a permittee the opportunity to pay a civil penalty rather than have the permit suspended. However, if the basis for the suspension is a violation of Section 28.11 the permittee may not be afforded that option.¹⁰ The TABC has promulgated a rule to determine whether a permittee will be allowed to pay a penalty.¹¹ The rule requires consideration of such factors as the type of permit involved, the kind of violation, the permittee’s past record, and “any aggravating or ameliorating circumstances.”¹² If the permittee personally commits the infraction, the TABC should also consider the permittee’s exercise of due diligence; entrapment; knowledge; good faith; and whether the violation was technical.¹³

B. The Evidence

The TABC issued Respondent’s Mixed Beverage Permit MB525077 and Mixed Beverage Late Hours Permit LB525078. Respondent’s licensed premises are located at 3913 Wheeler, Fort Worth, Tarrant County, Texas. The incident took place on the premises at about 7:00 p.m. on July 9, 2003, near Respondent’s office door and an adjacent “throw line” for a dart board.

Ruby Gabbard, Deborah Thompson, and Paula Waldrep were present at the premises for a dart match. Deborah Thompson was the captain of a visiting dart team which was playing at the premises that

⁸ *Id.* § 1.07(a)(17).

⁹ The TABC’s “Standard Penalty Chart recommends that a permit be suspended of 10 to 15 days in the case of a simple breach of the peace and suspended for 45 days or canceled in the case of an aggravated breach of the peace. 16 TAC § 37.60.

¹⁰ § 11.64(a) of the Code

¹¹ 16 TAC § 37.61.

¹² *Id.* § 37.61(b) & (c).

¹³ § 11.64(b) & (c).

Docket No. 458-04-2345

Proposal For Decision

Page 4

night. Ruby Gabbard was with her boyfriend Steve Marsh, who was playing on the visiting team, and Paula Waldrep, another friend. Ms. Gabbard was not playing in the match. Respondent and her husband Reed Melvin were present to deliver sales and tax records to Respondent's C.P.A., Coby Reece.

Respondent, Mr. Melvin, and Mr. Reece were seated at a table some distance from Respondent's office.¹⁴ Respondent left the table and walked to her office, opening the door, and interfering with the at the throw line of the dart board on which the match was being played. At some point, Ms Gabbard lodged a protest with Respondent concerning the interference. Respondent entered the office, closing the door. Respondent retrieved the records for Mr. Reece, and a red, hard-plastic, Igloo-type cooler for her husband. The cooler was about the size necessary to hold six cans of beverage. Mr. Melvin kept his wallet, sunglasses, and other personal items in the cooler. Respondent opened the office door, and exited the office. Seconds later Respondent struck Ms. Gabbard under her left eye. The visitors Ms. Gabbard, Ms. Thompson, and Ms. Waldrep related very different details of the blow than those provided by Respondent, Mr. Melvin, and Mr. Reece.

According to the visitors, Ms. Gabbard was sober, having had nothing to drink prior to arriving at the premises. Respondent, on the other hand, was intoxicated, belligerent, and profane. Ms. Gabbard approached Respondent after the office door had interfered with the dart game and politely requested that Respondent not keep opening and closing the door. Respondent, in this version, informed Ms. Gabbard that it was Respondent's bar, and that she did not care if she was interfering with the game. Ms. Gabbard took a seat at a table with Ms. Thompson and Ms. Waldrep. Respondent then exited her office cursing Ms. Gabbard, walked to the table, and struck Ms. Gabbard under the left eye with the cooler. Ms. Gabbard picked up a chair, raised it, and then put the chair down. Ms. Thompson called 911 for Ms. Gabbard, seeking medical attention for Ms. Gabbard's eye which was already swelling.

Respondent's version is substantially different. Respondent and Mr. Melvin stated they had been

¹⁴ Mr. Reece said the distance was 20 yards; Mr. Melvin stated the distance was about 10 yards.

Docket No. 458-04-2345

Proposal For Decision

Page 5

at a funeral service most of the day, and Respondent had nothing to drink until she arrived at the premises to meet Mr. Reece. Respondent went into her office, got what she needed, and opened the door. Respondent was standing with the door opened, considering whether she had obtained everything she needed from the office. Respondent had the paperwork under her left arm and was holding the cooler in her left hand. She was confronted by Ms. Gabbard, who was intoxicated, aggressive, and foulmouthed.¹⁵ Ms. Gabbard cursed Respondent for interrupting the game, grabbed at Respondent, picked up a chair and put it down, and grabbed at Respondent again. Respondent struck Ms. Gabbard under her left eye with her right hand, in self-defense. She did not call the police.¹⁶ Mr. Melvin's observations agreed with Respondent's, especially that Ms. Gabbard grabbed Respondent, picked up and put down a chair, and grabbed Respondent again. Mr. Reece heard a shout and saw Ms. Gabbard with her arm out as if she just had, or was about to, grab or shove Respondent. He then saw Respondent strike Ms. Gabbard with her right hand. Respondent and her husband left the premises immediately after the incident.

Ms. Gabbard saw a doctor the next day. She had lacerations on her left eye and was left with a scar underneath her left eye. The scar manifests itself as a small, dark blemish under the inside corner of Ms. Gabbard's eye. A photograph of Ms. Gabbard taken by a TABC agent on July 10, 2003, shows her to have large, bruised swelling under her left eye.¹⁷ Ms. Gabbard's doctor was concerned that she had suffered a broken cheekbone but an x-ray demonstrated no break. Her injuries took about one month to heal.

Respondent and Mr. Melvin attributed the damage to Ms. Gabbard's eye and cheek to two rings Respondent wore on her right hand.

¹⁵ The visitors testified the "protest" took place before Respondent entered the office, not after she left.

¹⁶ Respondent did send the TABC written notice of the incident the next day. See Respondent's Exhibit 3 & § 11.6J(b)(21) of the Code, which requires the permittee to "promptly report" any breach of the peace occurring on the licensed premises to the TABC.

¹⁷ TABC Exhibit #3.

Docket No. 458-04-2345

Proposal For Decision

Page 6

C. Analysis & Recommendation

1. The Staff's Arguments

The Staff accepts the visitors' version of the events of July 9, 2003: Respondent struck Ms. Gabbard with the cooler; Respondent was intoxicated; Respondent failed to supervise her own conduct; and Respondent fled the premises. The Staff compared Ms. Gabbard's injuries to the two means alleged to have created them, the cooler or Respondent's fist, and argues that only the cooler could have caused the damage. The Staff asserts that Respondent should have resolved the dispute in a "calm manner instead of an assault." Without much analysis, the Staff charged Respondent with an aggravated breach of the peace.

The Staff's argument for cancellation of Respondent's permits rests upon the following:

- The permit holder personally committed the offense.
- The assault was aggravated by using the cooler.
- The assault was intentional.
- Respondent did not warn Ms. Gabbard prior to the assault.
- Respondent's employees did not call the police.
- Ms. Gabbard sustained permanent disfigurement.
- Respondent fled the scene.
- Respondent's conduct was not justified or excused.

2. The Respondent's Arguments

Respondent argues that Ms. Gabbard was intoxicated, threatening, and placed Respondent in fear for her safety when Ms. Gabbard raised the chair. Under Respondent's reasoning, striking Ms. Gabbard with her fist was a legitimate act of self-defense, and, accordingly, no breach of the peace occurred. In

Docket No. 458-04-2345

Proposal For Decision

Page 7

support of this argument, Respondent notes that the Tarrant County District Attorney did not file a case against Respondent. The District Attorney's failure to act demonstrates a "complete lack of probable cause to believe any crime was committed."

Respondent also requests a dismissal of this matter on the basis of a variance between the Staff's notice of hearing (NOH) and the proof at the hearing. The NOH alleges that Respondent caused a breach of the peace when she "threw an ice chest" at Ms. Gabbard. Since "no one who testified at the hearing said that a cooler was thrown at Gabbard," Respondent was "either not given sufficient information to prepare a defense or that the case should be dismissed due to failure of the TABC to prove its' own allegations."

3. The Issues Presented

a. Was This a Simple or Aggravated Breach of the Peace?

The clash between Respondent and Ms. Gabbard resulted in a breach of the peace.¹⁸ The two distinguishing characteristics of an aggravated breach of the peace are the presence of serious bodily injury or the use of a deadly weapon.¹⁹

i. Was There Serious Bodily Injury?

"Bodily injury" and "serious bodily injury" are distinct concepts; whether an assault results in one or the other must be determined on a case by case basis.²⁰ Ms. Gabbard suffered lacerations of her left

¹⁸ "Breach of the peace" is "breaking or disturbing the public peace by any riotous, forcible, or unlawful proceeding." *Black's Law Dictionary* (Rev. 4th Ed. 1968).

¹⁹ 16 TAC § 37.60 (Standard Penalty Chart).

²⁰ *Moore v. State*, 739 S.W.2d 347, 349 (Tex. Crim. App. 1987).

Docket No. 458-04-2345

Proposal For Decision

Page 8

eye, and a scar below her left eye. Ms. Gabbard certainly suffered bodily injury, because she experienced pain and a month-long impairment of her left eye. She did not die and was not at risk of death.²¹ She did not suffer a protracted loss or impairment of her eye.²² She did not suffer any broken bones.

Did Ms. Gabbard suffer "serious permanent disfigurement?" A serious permanent disfigurement is usually found when the victim suffers an overt or gross distortion of the features or a limb. Suffocating a child so that brain damage caused abnormal growth and development of the child's head was a serious permanent disfigurement.²³ In another case, a victim "suffered a shattered nose, broken cheekbone, and broken jawbone." A photograph of the victim's face taken after a substantial period of time and after several surgeries showed the victim's face to be "markedly asymmetrical." The evidence supported a finding of serious permanent disfigurement.²⁴

Findings that an injury was a serious permanent disfigurement are frequently based upon opinion testimony. For example, an orthopedic surgeon testified that a child's broken femur, if untreated, "would have healed in an abnormal position, resulting in a deformity of the leg that would have impaired its function." The doctor's testimony supported a finding that the broken leg was a serious permanent disfigurement.²⁵

²¹ A substantial risk of death means that the injury was life threatening; i.e., that it was so grave or serious that it must be regarded as differing in kind, and not merely in degree, from other bodily harm. *Moore* at 352.

²² A "protracted" loss or impairment is one that is "continuing, dragged out, drawn out, elongated, extended, lengthened, lengthy, lingering, long, long-continued, long-drawn, never-ending, ongoing, prolix, prolonged, or unending." *Id.*

²³ *Lincicome v State*, 3 S.W.3d 644, 648 (Tex.App.-Amarillo 1999, no pet.)

²⁴ *Carlson v. State*, 940 S.W.2d 776, 780 (Tex.App.-Austin 1997, no pet.).

²⁵ *Dusek v. State*, 978 S.W.2d 129, 133 (Tex.App.-Austin 1998, pet. ref'd); see *LaSalle v. State*, 973 S.W.2d 467, 469, 473 (Tex.App.-Beaumont 1998, no pet.) (mother's testimony); *Villarreal v. State*, 716 S.W.2d 651, 652 (Tex.App.-Corpus Christi 1986, no pet.) (where doctor failed to describe injuries as constituting a serious permanent disfigurement, a bruise and lacerations to victim's face were not serious bodily injuries).

Docket No. 458-04-2345

Proposal For Decision

Page 9

On the other hand, Texas courts have determined that a small scar is not serious permanent disfigurement.²⁶ Cigarette burns on a child's back that formed the letters "i-c-r-y" were not a serious permanent disfigurement.²⁷ A victim's beating injuries which included "lacerations and bruising" and required staples were not serious permanent disfigurements.²⁸

Ms. Gabbard did not testify as to the permanence of the scar she received. The Staff did not offer any opinion from a doctor concerning the seriousness of the scar. Ms. Gabbard's face is not distorted, and her scar is not pronounced. The ALJ recommends the Commission find that Ms. Gabbard did not suffer a serious permanent disfigurement.

ii. Was a Deadly Weapon Used?

The witnesses described Respondent striking Ms. Gabbard with either the cooler or with her fist. Was either a deadly weapon?²⁹

Scenario 1: Respondent used the cooler. A cooler is not a deadly weapon *per se*. Like a variety of other common objects, a cooler can be a deadly weapon if "in the manner of its use, it is capable of causing death or serious bodily injury."³⁰ The evidence must demonstrate that the cooler was *capable* of

²⁶ *Bueno v State*, 996 S.W.2d 406, 408 (Tex.App.-Beaumont 1999, no pet.)(two-inch scar on abdomen); *Hernandez v. State*, 946 S.W.2d 108, 113 (Tex. App.-El Paso 1997, no pet.)(scar from a stab wound and subsequent surgery); *McCoy v. State*, 932 S.W.2d 720, 724 (Tex. App.-Fort Worth 1996, pet ref'd)(slight scar on lip).

²⁷ *Pickering v. State*, 596 S.W.2d 124, 126-28 (Tex.Crim.App. 1980).

²⁸ *Jordan v. State*, 1 S.W.3d 153, 157 (Tex.App.-Waco 1999, no pet.); *but see LaSalle v. State*, 973 S.W.2d 467, 469, 473 (Tex.App.-Beaumont 1998, no pct.)(mother's testimony that infant's permanent facial scarring was a serious permanent disfigurement, and photograph of permanent facial scarring and disfigurement was sufficient to prove serious permanent disfigurement).

²⁹ Neither were, obviously, "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17).

³⁰ *Bui v. State*, 964 S.W.2d 335, 342 (Tex.App. - Texarkana 1998, no pct.). A club, a board, a knife, a hammer, a pipe, a fist, fire, a hand, a foot, a Coke bottle, a leg of a bar stool, an ax handle, and a Duraflame log have been found

Docket No. 458-04-2345

Proposal For Decision

Page 10

— causing death or serious bodily injury, not that it *actually* caused death or serious bodily injury. The evidence does not need to prove that Respondent intended to use the cooler as a deadly weapon but only that she in fact used it in a manner that could have caused death or serious bodily injury.³¹ Under this scenario, Respondent swung a hard-plastic cooler larger than a “six-pack” of soda and struck Ms. Gabbard in the head. The use of the cooler as a bludgeon³² was capable of causing death or serious bodily injury. If Respondent struck Ms. Gabbard with the cooler, she was using a deadly weapon.

Scenario 2: Respondent used her fist. A fist is not a deadly weapon *per se*.³³ Under this scenario, Respondent struck Ms. Gabbard with her fist. The ALJ observed Respondent’s slight physical build. Based upon that observation, and Mr. Melvin’s and Mr. Reece’s description of the blow, the ALJ does not believe the Respondent’s fist was capable of inflicting death or serious bodily injury in the manner it was used. If Respondent struck Ms. Gabbard with her fist, she was not using a deadly weapon.

iii. How did Respondent Injure Ms. Gabbard?

The two factions’ descriptions of the means are flatly contradictory, and are colored by each faction’s view of which contestant in the brawl was the aggressor. The ALJ has compared the two means of inflicting Ms. Gabbard’s injury and the injury actually inflicted. Ms. Gabbard’s eye was lacerated; her eye and cheek were swollen and discolored; the swelling was immediate after she was struck; Ms. Gabbard’s doctor took an x-ray to assure himself Ms. Gabbard’s cheekbone was not broken; the injuries took at least a month to heal; the blow left a scar. The amount of force necessary for Respondent to inflict that kind of damage, given Respondent’s slight stature and weight, leads the ALJ to conclude that

to be deadly weapons by the manner of their use. *Id.* at 343.

³¹ *Id.* at 342-43.

³² See TEX. PENAL CODE § 46.01(1): “Club” means an instrument that is specially designed, made, or adapted for the purpose of inflicting serious bodily injury or death by striking a person with the instrument, and includes but is not limited to the following: (A) blackjack; (B) nightstick; (C) mace; (D) tomahawk.

³³ *Jefferson v. State*, 974 S.W.2d 887, 892 (Tex.App. - Austin 1998, no pet.).

– Respondent struck Ms. Gabbard with the cooler.

In summary, the ALJ recommends that the Commission find that Respondent struck Ms. Gabbard with the cooler, the cooler was a deadly weapon, and the incident at the licensed premises was an aggravated breach of the peace.

b. Was the Breach of the Peace Not Beyond the Control of Respondent?

Respondent's decision to strike Ms. Gabbard was uniquely within Respondent's control. The ALJ will grant that Respondent had a difficult day, that she was grieving, and that Ms. Gabbard may have been profanely obnoxious. Nothing in section 28.11 of the Code, however, excuses Respondent's lack of self-control. Respondent could have avoided a breach of the peace by simply not striking Ms. Gabbard.

c. Did the Breach of the Peace Result from Respondent's Improper Supervision of the Persons on the Premises?

Respondent was in a position, and under an obligation,³⁴ to order Ms. Gabbard from the premises if she thought the visitor was intoxicated or dangerous to Respondent or others. Respondent had the option of calling the police to remove Ms. Gabbard from the premises. She did neither.

In short, the ALJ recommends that the Commission find that an aggravated breach of the peace occurred on the licensed premises which was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons permitted to be there.

d. Was Respondent's Act Justified as Self-Defense?

³⁴ §§ 1.03, 28.11, 11.61(b)(7), & 11.61(b)(9) of the Code.

Respondent was justified in using force against Ms. Gabbard “when and to the degree [she] reasonably [believed] the force [was] immediately necessary to protect [herself] against [Ms. Gabbard’s] use or attempted use of unlawful force.”³⁵ Verbal provocation is not sufficient.³⁶ As found above, Respondent employed a cooler in striking Ms. Gabbard. The use of the cooler was the employment of “deadly force,” because, as also found above, “the manner of its use” was “capable of causing, death or serious bodily injury.”³⁷ The use of deadly force is justified only if (1) the use of force was justified, (2) a reasonable person in Respondent’s situation would not have retreated, and (3) when and to the degree Respondent reasonably believed the deadly force was immediately necessary to protect herself against Ms. Gabbard’s use or attempted use of unlawful deadly force.³⁸ An “attempt” to commit an act is something that amounts to more than “mere preparation” that “tends but fails to effect” the act.³⁹ A number of sub-issues require analysis.

i. Did Ms. Gabbard Use Force or Deadly Force?

According to Respondent and Mr. Melvin, Ms. Gabbard grabbed at Respondent, picked up a chair and put it down, and grabbed at Respondent again. Each time Ms. Gabbard reached for Respondent she was employing or attempting to employ force against Respondent. The chair Ms. Gabbard picked up was potentially a deadly weapon. Ms. Gabbard’s action in picking up and putting down the chair was “mere preparation” to the use of the chair, and was abandoned by Ms. Gabbard when she put the chair down. Ms. Gabbard did not attempt to use deadly force against Respondent.

³⁵ TEX. PENAL CODE ANN. §9.31(u) (Vernon 2004).

³⁶ *Id.* § 9.31(b)(1). The ALJ has refrained from addressing partisan issues such as who cursed whom, which person was the aggressor, and the like. Instead, this proposal rests as much as possible on more objective physical factors such as the nature and extent of Ms. Gabbard’s injuries, except where a mental state is brought into issue by a statute or rule.

³⁷ *Id.* § 9.01(3).

³⁸ *Id.* § 9.32(a).

³⁹ *Id.* § 15.01(a).

Docket No. 458-04-2345

Proposal For Decision

Page 13

ii. Was Respondent's Use of Force Immediately Necessary?

Respondent was justified in reacting to Ms. Gabbard's last grab at her to the degree she reasonably believed immediately necessary to protect herself. Respondent's use of a deadly weapon in response to non-deadly force was not necessary under the circumstances. A variety of less perilous reactions were available to Respondent: pushing Ms. Gabbard's hand away, backing away, or calling for help.

iii. Did Respondent Justify Her Failure to Retreat?

Respondent did not attempt to justify her failure to retreat in the face of Ms. Gabbard's actions. Indeed, Respondent's stated attitude was one of not allowing Ms. Gabbard to "get away with" harrasing her.

In brief, the ALJ recommends that the Commission find that Respondent did not act in justifiable self-defense.

c. What Is the Appropriate Sanction?

The Staff recommends that Respondent's permits be canceled for cause. The Staff asserts that these factors justify such a harsh remedy:

- the permittee committed the breach of the peace.
- the assault was aggravated by the use of the cooler.
- the assault was intentional.
- Respondent did not warn Ms. Gabbard prior to striking her.
- Respondent's employees did not call the police.
- Ms. Gabbard's eye was lacerated and she suffered permeant disfigurement.
- Respondent fled the scene

Docket No. 458-04-2345

Proposal For Decision

Page 14

- Respondent's conduct was not justified or excused.

Respondent argues that the Tarrant County District Attorney did not file a case against Respondent. The District Attorney's failure to act demonstrates a "complete lack of probable cause to believe any crime was committed."

The Proposal will consider each of the criteria set out in Section 11.64 of the Code and the TABC Rules separately.

1. **Should Respondent Have the Opportunity to Pay a Civil Penalty?**

Since Respondent violated § 28.11 of the Code, the TABC will have to determine whether Respondent will have the opportunity to pay a civil penalty in lieu of a suspension or cancellation of her permits.⁴⁰ The TABC should 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.⁴¹

The Respondent holds a mixed beverage permit and mixed beverage late hours permit. No direct evidence was offered whether alcohol sales constitute the main source of income for Respondent's business. However, the ALJ has determined that Respondent's main business is the sale of alcohol

⁴⁰ § 11.64(a) of the Code; 16 TAC § 37.61.

⁴¹ § 11.64(a) of the Code; 16 TAC § 37.61(b).

Docket No. 458-04-2345

Proposal For Decision

Page 15

Respondent employs a bouncer; bouncers are generally employed to keep order and remove intoxicated persons from a premises. In common experience, few restaurants require bouncers. Section 28.11 is a "health, safety, or welfare" violation.⁴²

Respondent's past violation history was admitted into evidence.⁴³ Based upon an unrelated incident, Respondent's permits were suspended for 15 days (April 16 to April 30, 2003) for "permittee intoxicated on the licensed premises." Respondent was offered an opportunity to pay a civil penalty of \$2,250 in lieu of the suspension. "Permittee intoxicated on the licensed premises" is also a health, safety, or welfare violation.⁴⁴ The ALJ recommends that the Commission find that these considerations weigh in favor of canceling or suspending Respondent's permits, rather than allowing her to pay another penalty.

ii. Are There Aggravating or Ameliorating Circumstances?

Aggravating or ameliorating circumstances may include but are not limited to:

- whether the violation was caused by intentional or reckless conduct by the licensee or permittee;
- 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

⁴² 16 TAC § 37.60 (Standard Penalty Chart).

⁴³ TABC Exhibit #2.

⁴⁴ 16 TAC § 37.60 (Standard Penalty Chart). The recommended penalty for a first violation is a seven day suspension, while a second violation calls for 10-15 days.

Docket No. 458-04-2345

Proposal For Decision

Page 16

calculated to avoid violations of the Alcoholic Beverage Code and rules of the commission.⁴⁵

Respondent intentionally struck Ms. Gabbard. Respondent's action did not cause Ms. Gabbard's death, nor did it cause serious bodily injury. Respondent has one prior violation that required a suspension of her permits. No evidence was admitted concerning the character and nature of Respondent's operation, aside from that reflected in this Proposal: Respondent struck a customer and Respondent (or an employee) has been intoxicated on the premises in the past. The Staff argued that Respondent's failure to warn Ms. Gabbard of the impending blow is an aggravating circumstance. The evidence does not support a finding one way or another on warning. The evidence suggests that the blow delivered on Ms. Gabbard was a spur of the moment decision. The Staff also faults Respondent for fleeing the premises. Again, the evidence does not suggest flight. It is true that Respondent did not call the police, but Respondent testified she did not believe the situation required a police presence. Respondent and Randy Guinn, her bouncer, both testified Respondent instructed Mr. Guinn to request Ms. Gabbard to leave, or to have the police escort Ms. Gabbard from the premises.

In sum, Respondent's past failure to control the premises combined with her current failure to control herself aggravate the case. Ms. Gabbard avoided a more serious injury by chance, not Respondent's design. The ALJ cannot recommend to the Commission that Respondent's method of doing business is calculated to avoid violations of the law. The ALJ recommends that the Commission find that the aggravating circumstances outweigh the ameliorating ones, and weigh in favor of canceling or suspending the permits.

⁴⁵ 16 TAC § 37.61(c).

iii. Are There Other Relevant Considerations?

Since the violation was committed by the permittee, the TABC should also consider whether:

- the violation could reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
- the permittee or licensee was entrapped;
- an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
- the permittee or licensee did not knowingly violate this code;

the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations; or

the violation was a technical one.⁴⁶

If Respondent had exercised due diligence, the breach of the peace could have been avoided. Respondent was not entrapped.⁴⁷ She was not enticed or lured into striking Ms. Gabbard by a law enforcement officer. Respondent committed the act, not some third person employee. Respondent's actions were knowing.⁴⁸ Respondent knew she was striking Ms. Gabbard and understood (but ignored)

⁴⁶ § 11.64(b)&(c) of the Code.

⁴⁷ Entrapment is a defense to criminal conduct which requires the accused to show he "engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." TEX. PENAL CODE § 8.06(a).

⁴⁸ "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts

Docket No. 458-04-2345

Proposal For Decision

Page 18

the consequences of her action: that Ms. Gabbard would be injured by the cooler. Accordingly, Respondent knowingly violated the Code. Respondent has not acted in good faith. Respondent testified she committed this act with her hand, instead of admitting she had used a weapon. There was no evidence that Respondent has taken steps to rectify the consequences of her actions. Ms. Gabbard has filed a civil suit, and Respondent's inaction may well be an offshoot of her defense of Ms. Gabbard's legal action. The violation was not a technical violation, but clear cut and substantial. The ALJ recommends that the Commission find that these considerations weigh in favor of canceling Respondent's Permits.

iv. What about the District Attorney's Failure to Act?

The Tarrant County district attorney did not seek an indictment of Respondent or file an information against her for assault or aggravated assault. The district attorney's reason for his inaction is unknown. Respondent equates this with a "complete lack of probable cause to believe any crime was committed."

In *Texas Department of Public Safety v. Norrell*,⁴⁹ Mr. Norrell sought to avoid an administrative suspension of his driver's license by arguing that the district attorney had decided not to file a driving while intoxicated case against Mr. Norrell.⁵⁰ Mr. Norrell argued that the district attorney's action was tantamount to an acquittal.⁵¹ The court held that "a decision on the part of the prosecutor cannot constitute a fact finding or a certification that the accused is not guilty. Quite simply, a defendant cannot be acquitted of an offense unless and until he is charged and jeopardy has attached."⁵² There are many

knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." TEX. PENAL CODE § 6.03(b).

⁴⁹ 968 S.W.2d 16 (Tex.App.—Corpus Christi 1998, no writ).

⁵⁰ *Norrell*, 968 S.W.2d 16, 17-18 (Tex.App.—Corpus Christi 1998, no writ).

⁵¹ Under the Transportation Code an acquittal of the underlying D.W.I. case would require a rescission of any administrative suspension. TEX. TRANS. CODE ANN. § 724.048(c) (Vernon 2004).

⁵² *Norrell*, at 19.

Docket No. 458-04-2345

Proposal For Decision

Page 19

reasons why a prosecution might not be commenced "against a particular defendant at a particular time. None of these reasons, however, prevent a prosecutor from timely filing criminal charges in the future, nor do they affect the [administrative agency's] ability to prove the elements of the administrative hearing by a preponderance of the evidence."⁵³ The ALJ finds that *Norrell* is applicable to this case, and the Tarrant County district attorney's failure to act is not probative evidence of a lack of probable cause to believe Respondent assaulted Ms. Gabbard. The TABC may, independently, review the evidence and come to a conclusion based upon the preponderance of the evidence. The ALJ recommends that the TABC give no weight to the inaction of the Tarrant County district attorney.

v. Summary

Respondent runs a bar, and this is her second health, safety, or welfare violation. Respondent acted intentionally, causing bodily injury to a patron. Given Respondent's history, her business practice is not reasonably calculated to avoid violations of the Code. Respondent committed the violation personally, and has not acted in good faith.

f. Did Respondent Have Adequate Notice?

Respondent requests a dismissal of this matter on the basis of a variance between the Staff's NOH and the proof at the hearing. The NOH alleged that on July 9, 2003, Respondent threw an ice chest at Ruby Gabbard striking her in the eye and face. The proof was that on July 9, 2003, Respondent struck Ruby Gabbard in the eye and face with a cooler.

⁵³ *Norrell*, at 20; *Texas Department of Public Safety v. Stacy*, 954 S.W.2d 80, 81-82 (Tex.App.—San Antonio 1997, no writ).

Docket No. 458-04-2345

Proposal For Decision

Page 20

A litigant in an administrative hearing is entitled to "reasonable notice"⁵⁴ consisting of "a short, plain statement of the matters asserted."⁵⁵ In *Texas Alcoholic Beverage Commission v. Mini, Inc.*,⁵⁶ the NOH alleged the date of the assault, the names of the assailants, and otherwise tracked the language of section 28.11. The permittee excepted to the NOH claiming it should have named the person who should have been supervised by the permittee and how the permittee should have supervised that person. The ALJ overruled the permittee's exceptions, finding that the permittee had adequate notice of the facts⁵⁷

In this case, Respondent did not except to the NOH. The variance between throwing a cooler and swinging a cooler is not material to the offense alleged, *i.e.*, a breach of the peace. The NOH sent to Respondent alleged the correct date of the incident and that Respondent assaulted Ms. Gabbard. Further, Respondent did not object when Ms. Gabbard, Ms. Thompson, and Ms. Waldrep testified Respondent swung the cooler at Ms. Gabbard on the basis their testimony varied from the NOH's allegation. The ALJ recommends that the Commission find that Respondent had adequate notice.

Consequently, the ALJ recommends the TABC find that cancellation of Respondent's permits is appropriate.

IV. FINDINGS OF FACT

1. Lois Marie Melvin d/b/a Hold-Em-High (Respondent) was issued Mixed Beverage Permit MB525077 and Mixed Beverage Late Hours Permit LB525078.

⁵⁴ TEX. GOV'T CODE § 2001.51(1).

⁵⁵ *Id.* § 2001.52(a)(4).

⁵⁶ 832 S.W.2d 147 (Tex.App. – Hous. [14th Dist.] 1992, no writ).

⁵⁷ *Texas Alcoholic Beverage Commission v. Mini, Inc.*, 832 S.W.2d 147, 151 (Tex.App. – Hous. [14th Dist.] 1992, no writ).

Docket No. 458-04-2345

Proposal For Decision

Page 21

2. Respondent's licensed premises are located at Respondent's licensed premises are located at 3913 Wheeler, Fort Worth, Tarrant County, Texas.
3. On July 9, 2003, at approximately 7:00 p.m., Ruby Gabbard was present at the premises to watch a dart match.
4. Respondent was also present
5. An argument between Respondent and Ms. Gabbard ensued.
6. Respondent struck Ms. Gabbard under her left eye with a red, hard-plastic Igloo-type cooler about the size necessary to hold six cans of beverage.
7. Ms. Gabbard had lacerations on her left eye and was left with a scar underneath her left eye
8. Ms. Gabbard's scar manifests itself as a small, dark blemish under the inside corner of her left eye
9. Respondent committed a breach of the peace when she struck Ms. Gabbard.
10. Ms. Gabbard did not suffer a serious permanent disfigurement.
11. The manner in which the cooler was used by Respondent was capable of causing death or serious bodily injury.
12. Respondent was using a deadly weapon when she struck Ms. Gabbard with the cooler.
13. The breach of the peace was not beyond the control of Respondent.
14. The breach of the peace resulted from Respondent's improper supervision of Ms. Gabbard.
15. Respondent intentionally struck Ms. Gabbard.

Docket No. 458-04-2345

Proposal For Decision

Page 22

16. If Respondent had exercised due diligence, the breach of the peace could have been avoided
17. Respondent was not entrapped.
18. Respondent's actions were knowing.
19. Respondent has taken no steps to rectify the consequences of her actions.
20. Respondent's violation was not a technical violation, but clear cut and substantial
21. Respondent was not justified in using the degree of force she employed against Ms. Gabbard.
22. Alcohol sales constitute the main source of income for Respondent's business.
23. Section 28.11 is a "health, safety, or welfare" violation.
24. Respondent's permits were suspended for 15 days (April 16 to April 30, 2003) for "permittee intoxicated on the licensed premises," a health, safety, or welfare violation.
25. On January 28, 2004, the Staff issued a notice of hearing (NOH) notifying all parties that a hearing would be held and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters
26. The NOH gave Respondent adequate notice of the facts which the Staff proposed to prove.
27. On March 26, 2004, ALJ Robert F. Jones Jr. convened the hearing at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. The Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent appeared in person and through counsel. The hearing was concluded on March 26, 2004, and the record closed on April 9, 2004, after the parties filed final written arguments.

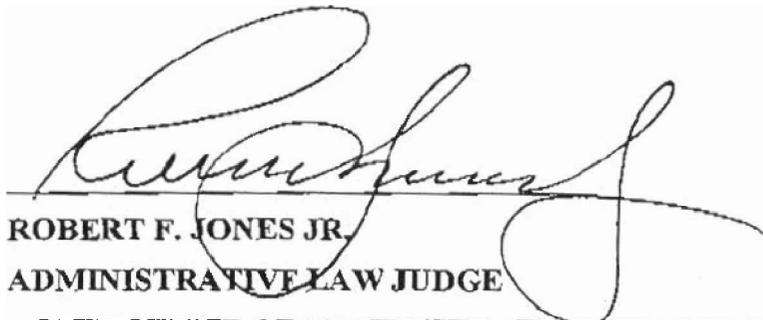
Docket No. 458-04-2345

Proposal For Decision

Page 23

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH 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 2004).
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 2004).
4. Based on the foregoing findings, Respondent committed an aggravated breach of the peace on the permitted premises. §§ 28.11, 11.61(b)(2) of the Code; 16 Tex. Admin. Code (TAC) § 37.60 (Standard Penalty Chart).
5. Based on the foregoing findings and conclusions, Respondent should not be afforded an opportunity to pay a civil penalty in lieu of a suspension or cancellation of her permits § 11.64(a) of the Code; 16 TAC § 37.61.
6. Based on the foregoing findings and conclusions, the TABC should not relax any provision of the Code relating to the suspension or cancellation of Respondent's permits. § 11.64(b) of the Code.
7. Based on the foregoing findings and conclusions, Mixed Beverage Permit MB525077 and Mixed Beverage Late Hours Permit LB525078 should be canceled. § 11.61(b)(5) of the Code.

SIGNED April 22, 2004.

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