

DOCKET NO. 615674

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
311 MOCKINGBIRD INC.	§	ALCOHOLIC
D/B/A BARNEY'S BILLIARD SALOON NO. 11	§	
PERMIT/LICENSE NO(s). MB235263	§	
VICTORIA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1319)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Melissa M. Ricard. The hearing convened on July 17 and 18, 2006 and adjourned on July 18, 2006. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 16, 2006. The 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 and replies were filed. The Administrative Law Judge overruled the exceptions.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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 your permit(s) and/or license(s) is/are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on March 26, 2007, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this February 27, 2007.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

WMC\bc

The Honorable Melissa M. Ricard
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (361) 884-5427

—
Ronald Monshaugen
ATTORNEY FOR RESPONDENT
1225 North Loop West, Ste. 640
Houston, TX 77008
VIA FAX (713) 880-5297

311 MOCKINGBIRD INC.
RESPONDENT
d/b/a BARNEY'S BILLIARD SALOON NO. 11
9000 SW Fwy Ste 303
Houston, TX 770741521

W. Michael Cady
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Enforcement Division

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 16, 2006

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

**RE: Docket No. 458-06-1319/ TABC vs, 311 MOCKINGBIRD, INC. D/B/A
BARNEY'S BILLIARD SALOON NO.11**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Melissa M. Ricard
Administrative Law Judge

MMR/mar
Enclosure

xc: **Natalie Howard, State Office of Administrative Hearings- VIA REGULAR MAIL**
W.MICHAEL CADY, STAFF ATTORNEY, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-VIA REGULAR MAIL
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-VIA HAND DELIVERY
RONALD A. MONSHAUGEN, Attorney at Law, 1225 North Loop West Suite 540, Houston, Tx 77008 -VIA REGULAR MAIL

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 2

On August 28, 2006, the Respondent filed a Motion for Post-Hearing Rebuttal/Impeachment Evidence. On September 11, 2006, the Petitioner filed a Supplemental Response to that Motion with a motion to admit additional evidence. By order dated September 12, 2006, both motions were denied.

II. BACKGROUND

Respondent is the holder of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued by the TABC for the premises known as Barney's Billiard Saloon at 311 Mockingbird Lane, Victoria, Victoria County, Texas (Barney's).

On December 11, 2006, Eric Hughes, age 27, of Victoria, Texas, met with friends at Barney's to celebrate his birthday. While he was there, Mr. Hughes was served several drinks. Mr. Hughes was served at least four large specialty Long Island Iced Teas and a shooter of "liquid cocaine" over a short period of time. Mr. Hughes initiated a fight with several other men and was physically removed from the establishment by the manager, Mr. George Sample. Someone threatened to call the police. Mr. Hughes got into his car and drove away, spinning his tires. Minutes later, Mr. Hughes ran a stop sign, killing Mrs. Cynthia Garza and injuring the three young girls who were in her car. Mr. Hughes plead guilty to intoxication manslaughter and is serving a 10 year sentence.¹

III. THE ALLEGATIONS AND APPLICABLE LAW

A. Allegations

Staff alleges that Respondent, its agent, servant or employee, sold or delivered an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14); and that Respondent, its agent, servant, or employee, sold, served, or provided an alcoholic beverage to

¹ Department Ex. 31

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 3

an individual when, at the time the provision occurred, it was apparent to the provider that the individual was obviously intoxicated to the extent that he presented a clear danger to himself and others, and the intoxication was a proximate cause of the damages suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02.

B. Respondent's Affirmative Defense

Respondent raised TEX. ALCO. BEV. CODE ANN. § 106.14(a), or the "safe harbor" statute, as an affirmative defense, claiming that Respondent is protected from TABC's action because Respondent complied with this statute.

In pertinent part, TEX. ALCO. BEV. CODE ANN. §106.14(a) states that the sale, service, dispensing, or delivery of alcoholic beverages to a minor or an intoxicated person 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.

A licensee who claims exemption from administrative action under TEX. ALCO. BEV. CODE ANN. § 106.14(a) bears the burden of proof. TABC's action against a permittee is barred if that permittee alleges and proves all three components of the statute.

The Department contends that the safe harbor defense is not applicable to this matter since under TABC Rule § 50.10(c), the Respondent has more than two violations in a twelve month period. TABC Rule § 50.10(c) provides:

(c) Proof by the Commission that an employee or agent of a licensee/permittee sold, delivered or served alcoholic beverages to a minor or intoxicated person, more than twice within a 12 month period, shall constitute prima facie evidence that the licensee/permittee had directly or indirectly encouraged violation of the relevant laws.

IV. EVIDENCE AND ANALYSIS

- A. Did Respondent, its agent, servant or employee, sell or deliver an alcoholic beverage to an intoxicated person, in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), on December 11, 2004?**

1. Evidence

a. Mrs. Hubbard's testimony

Mrs. Amanda Hubbard was with her husband and Mr. Hughes on December 11, 2004. They first encountered Mr. Hughes that night at Dodge City, a bar in Victoria, Texas. While at Dodge City, she saw Mr. Hughes consume two drinks. Mr. Hughes left Dodge City, and 20-30 minutes later, Mrs. Hubbard and her husband followed. They drove first to one place, but did not see Mr. Hughes' vehicle there, so they continued on to Barney's which was about 10 minutes away and a favorite place of Mr. Hughes to play pool. They found Mr. Hughes' vehicle, a white Jimmy GMC, in the parking lot of Barney's, parked right in front of the front door.

Mrs. Hubbard saw Mr. Hughes holding a souvenir glass in his hand in the parking lot of Barney's. The glass is about 8-10 inches tall. She knows this to be a glass which a patron can keep after they order a special Long Island Ice Tea and pay \$10. She saw Mr. Hughes drop the glass, but it did not break, and only the bottom of the glass was chipped. Mr. Hughes picked up the glass and they proceeded into the bar.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 5

Once inside, Mrs. Hubbard and Mr. Hughes went to the bar to get drinks. Mrs. Hubbard was twenty five years old at the time of the incident, but was not asked for identification by the bartender. Mr. Hughes ordered a Long Island Iced Tea and drinks for the Hubbards from Mr. George Sample, who was tending bar. When they had the drinks, they went over to a pool table. A waitress brought over the pool balls and Mr. Hughes told the waitress to keep the drinks coming, saying "don't let them go empty."²

They began to play pool. Mr. Hughes ordered two more Long Island Iced Teas, one for him and one for Mr. Hubbard and an additional drink for Mrs. Hubbard.³ Mr. Hughes' drinks were always refilled into the same large souvenir glass.

While they were playing pool, Mr. Hughes was showing signs of intoxication. Mr. Hughes was slurring his words, and Mrs. Hubbard had to get close to him to understand what he was saying. Even though Mr. Hughes wears a tongue ring and has a lisp, he was more difficult to understand than usual. Mr. Hughes smelled of alcohol and could not stand straight up. He was leaning on the pool table, on the pool cue and on a chair. Mr. Hughes could not hit the pool balls and was using his hands to put the balls in the pockets during the game. Out of concern for his condition, and while still playing pool, Mr. and Mrs. Hubbard asked Mr. Hughes to let them take him home that night after they were done and Mr. Hughes agreed.

Mr. Hughes ordered another round of drinks and got into an argument with the waitress over his change. The waitress brought the drinks, including another Long Island Iced Tea, and she handed Mr. Hughes change for a \$50 bill. Mr. Hughes thought he had given the waitress a \$100 bill. They argued for five minutes about the change. While they were arguing, Mr. Hughes was obviously intoxicated. He had slurred speech, a strong smell of alcohol and unsteady, swaying balance. Mr.

² Department Ex.22 shows that pool balls were checked out to that table at 10:15 p.m

³ This round of drinks is not contained in Mrs. Hubbard's affidavit dated February 18, 2006, Department Ex. 24.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 6

Hughes leaned on the pool table and a chair during the argument. At one point, he stood straight up and then swayed heavily to the right, completely losing his balance. The argument was diffused by Mrs. Hubbard who told Mr. Hughes that she saw that he had paid the waitress with a \$50 bill.

A short time later, Mr. Hughes ordered a shot of "liquid cocaine" and a Sprite for himself, and drank the shot. He left the pool table to go to the bathroom. Minutes later, Mr. Hubbard followed him to the bathroom. Mrs. Hubbard did not see Mr. Hughes get into a fight, but she saw Mr. Sample taking Mr. Hughes out of the bar, with Mr. Hughes' arms pinned behind his back. Two other men picked up Mr. Hughes' legs and threw him out the door. Mrs. Hubbard gathered up her belongings and proceeded to the front door, where a crowd had gathered. Mr. Hughes got into his vehicle, and Mrs. Hubbard asked him to get out of his SUV, and let her take him home. Mr. Hughes had a blank stare, and seemed disoriented. Mrs. Hubbard heard Mr. Sample tell someone to call the police. Mr. Hubbard also tried to get Mr. Hughes to let them take him home. Mr. Hughes left the scene, telling Mrs. Hubbard that the police were coming so he needed to leave.

b. Mr. Hubbard's testimony

On December 11, 2004, Mr. Jason Hubbard was with his wife and his friend, Mr. Hughes. He corroborated Mrs. Hubbard's testimony that they first encountered Mr. Hughes at Dodge City, and that Mr. Hughes consumed two beverages there. Mr. Hubbard thought both drinks contained alcohol. Also, shortly after, they were with Mr. Hughes again at Barney's at approximately 10:00 p.m., having last seen him at Dodge City about 30 minutes prior. Mr. Hughes was standing outside with a large glass with a Barney's logo on it in his hand talking to someone. Mr. Hubbard asked Mr. Hughes about the glass. Mr. Hughes told Mr. Hubbard that it was souvenir glass that Barney's gives to patrons who buy a drink known as a Long Island Iced Tea. They all entered Barney's, and Mr. Hubbard visited with some people he knew. Mr. and Mrs. Hubbard and Mr. Hughes sat at a pool table in the back and began to play pool.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 7

Mr. Hubbard observed that Mr. Hughes drank three or four Long Island Iced Teas and one shot of "liquid cocaine" at Barney's.⁴ The waitress came by every 15-20 minutes to check on their drinks. Mr. Hubbard observed that Mr. Hughes began to show signs of intoxication. Mr. Hughes had unsteady balance and used the pool table to support himself. While they were playing pool, Mr. Hughes had slurred speech. Mr. Hubbard told Mr. Hughes that he and his wife wanted to drive Mr. Hughes home whenever they were all ready to leave the bar because Mr. Hubbard believed that Mr. Hughes was too intoxicated to drive.

Mr. Hubbard admitted drinking three to six beers over the course of the evening. Mr. Hubbard remembers that Mr. Hughes ordered two Long Island Iced Teas at one time, because Mr. Hubbard wanted the glass. Mr. Hubbard failed to mention that round of drinks when he provided a statement to the TABC on February 18, 2004.

Mr. Hubbard went to go to the bathroom right after Mr. Hughes had left the table. Mr. Hubbard noticed a crowd had gathered and an argument was taking place with Mr. Hughes in the middle. Mr. Hubbard observed Mr. Sample stepping in to handle the situation, so he continued on to the bathroom. When he left the bathroom, he noticed the crowd had gathered by the front door. On his way to the front door, Mr. Hubbard heard that Mr. Hughes had been thrown out of Barney's. Mr. Hubbard went outside and saw Mrs. Hubbard standing next to Mr. Hughes' vehicle, talking to Mr. Hughes, who was inside his vehicle. Mr. Hubbard asked Mr. Hughes to get out of the vehicle and let the Hubbards take him home. When someone standing at the entrance yelled to call the police, Mr. Hughes sped out of the parking of the parking lot, spinning his tires and making an obscene gesture.

Mr. Hubbard stated that Mr. Hughes weighed about 150-170 pounds.⁵

⁴ In his statement dated February 18, 2004, Mr. Hughes stated that the waitress served Mr. Hughes two drinks.

⁵ Mr. Hughes' drivers license information indicates that he was 6'0" tall and 152 lbs. Department's Ex. 32.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 8

c. Christine Wagner's Testimony

Ms. Christine Wagner did not appear at the hearing. However, a statement which she gave to the TABC on December 21, 2004 was admitted into the record.

Ms. Wagner was working as a waitress at Barney's on December 11, 2004. Somewhere between 10:30 p.m. and 10:45 p.m. Mr. Hughes and his party sat at a table. She served them 2-3 rounds of mixed drinks. The last drink she served was a sprite. Mr. Hughes was involved in an argument and forced to leave at around 11:15 p.m. Ms. Wagner recalled seeing Mr. Hughes in Barney's before he sat at the pool table.⁶

d. Mr. George Sample's Testimony

Mr. George Sample was the manager for Barney's on December 11, 2004. Mr. Sample recalls first seeing Mr. Hughes at the bar. He was served a beverage by the bartender, Brittany Gibbs. Mr. Sample believes that he saw Mr. Hughes sitting at the bar drinking for a couple of hours. His practice is to count patrons' drinks so that they are not allowed to over indulge. He counted Mr. Hughes' drinks at the bar, but he was quiet and did not cause concern. Mr. Sample did not remember seeing Mr. Hughes leave and go outside for a period of time and then return. Mr. Hughes' friends came in at around 10:00 p.m. After Mr. Hughes and his friends moved to the pool table, Mr. Hughes did not capture Mr. Sample's attention, as he did not become loud. The party was served by a waitress, Christine Wagner, the entire time they were at the pool table.

Around 11:00 p.m., Mr. Sample observed Mr. Hughes get into an altercation with some individuals. Mr. Hughes was in the middle of six other men, about to put a cigarette out on another patron. Mr. Sample went over to get in between them, and he surmised that Mr. Hughes was the instigator in this situation as the other individuals seemed very calm. The other individuals indicated

⁶ Department's Ex. 21.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 9

that Mr. Hughes had started a verbal argument with them. Mr. Sample asked Mr. Hughes to leave the bar. Mr. Sample observed "zero" signs of intoxication from Mr. Hughes during this confrontation. Mr. Hughes wanted to go back to his table and get his cigarettes before he left, but Mr. Sample would not allow him to do so. Mr. Hughes grabbed Mr. Sample by his shirt, and a scuffle ensued. Mr. Sample had Mr. Hughes' arms pinned behind his back and was leading him toward the door, when Mr. Hughes spun out of the hold. Mr. Willie Whitfield tackled Mr. Hughes, and both men took Mr. Hughes out the door. Mr. Whitfield laid Mr. Hughes on the ground, in a choke hold. Mr. Hughes appeared sleepy, and Mr. Sample thought he was subdued. Mr. Sample returned inside to call the police about the assault. Mr. Sample testified that Mr. and Mrs. Hubbard were the ones that put Mr. Hughes in his vehicle and let him drive away.

Mr. Sample claims Mr. Hughes was only served one drink at the table, but he admitted that he does not know what was served. Mr. Sample was certain that Mr. Hughes was only served one large specialty and one regular Long Island Iced Tea on the evening of December 11, 2004. At the hearing, He stated that he did not personally serve Mr. Hughes any alcoholic beverages. Mr. Sample stated that he immediately asked Ms. Wagner what Mr. Hughes had been served right after he left, and Ms. Wagner told him that she only served one round to the table and that the last drink was a Sprite. This was the basis for his certainty that Mr. Hughes had only one alcohol drink served by Ms. Wagner. Among the glasses left at the table, Mr. Sample recalls seeing a shooter glass left on the table. He did not recall telling TABC Agent Myer that he personally served Mr. Hughes two drinks when Agent Myers took his statement in December of 2004.

A standard size drink at Barney's during the time of the incident was 14 oz. On cross examination, Mr. Sample stated that he believed that most individuals would be over or close to the legal limit of alcohol if they consumed three drinks in one hour.

e. Willie Whitfield's testimony

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 10

Mr. Willie Whitfield was formerly a Jackson County jailer and is presently an officer with the Victoria Police Department. He has been dating Ms. Brittany Gibbs, the bar tender on duty on December 11, 2004, for two years. Also, he has developed personal relationships with the employees at Barney's.

When Mr. Whitfield arrived at Barney's on December 11, 2004, he observed Mr. Hughes sitting at the bar by himself. Later, he observed Mr. Hughes leave the bar for about 15 minutes with a specialty glass in his hand and then return inside the bar with some other individuals.

He later observed Mr. Hughes getting into an altercation with other individuals at a front table and Mr. Sample stepping in. Mr. Hughes tried to go back into the bar and Mr. Sample asked him to leave. Mr. Hughes grabbed Mr. Sample, and then they were wrestling. Mr. Sample fell to the ground. Mr. Whitfield grabbed Mr. Hughes and helped Mr. Sample put him outside on the ground, while Jesee Perez, an employee of Barney's, held the door open. Mr. Hughes was cussing, yelling and threatening to kill Mr. Sample. Mr. Whitfield could not determine whether Mr. Hughes was intoxicated. Mr. Hughes was running around outside. No one took Mr. Hughes' keys away from him. Mr. Whitfield observed Mr. Hughes drive his vehicle away.

f. Lieutenant John Kevin Sanderson's testimony

On December 11, 2004, Victoria Police Department Lieutenant John Kevin Sanderson heard a dispatch of a disturbance at Barney's involving a driver in a white SUV. Five to 10 minutes later, Lt. Sanderson was dispatched to the scene of a major accident at the intersection of N. Vine and W. Constitution Streets in Victoria County, Texas, which also involved a white SUV, and was in close proximity to Barney's. Lt. Sanderson arrived at the accident scene at 11:20 p.m., where he observed that a white GMC SUV and blue Mercury Sable were involved in the accident. The white GMC was on its side and an individual, later identified as Mr. Hughes, was standing next to it. There were four individuals inside the Mercury and the driver was unconscious and suffering major injuries. The passengers were also injured. Lt. Sanderson observed that the direction of travel of the Mercury

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 11

indicated that it had the right of way in the intersection and that the white GMC had disregarded a stop sign.

Mr. Hughes was outside his vehicle, shouting and belligerent. Mr. Hughes appeared intoxicated. He had a strong odor of alcohol, slurred speech, and was very uncooperative. At one point, Mr. Hughes jumped into the back of an ambulance with a lit cigar. He had to be removed from the ambulance by the police officers, so that the injured individuals in the other car could be treated. Mr. Hughes was agitated, walking around, and expressing the desire walk away from the scene. He was spitting blood, yelling and cursing. Due to his state and his potential to flee, Mr. Hughes had to be taken to the ground and handcuffed. The officers contemplated using a tazer to subdue him. He had to be strapped into a stretcher, and was masked so that he could not spray blood on the responding personnel. He was taken to the hospital where he was treated for his injuries.

The driver of the Mercury, Ms. Cynthia Garza,, was pronounced dead at the hospital at 12:20 a.m. Field sobriety tests could not be given to Mr. Hughes. Mr. Hughes was charged with Intoxication Manslaughter. The Victoria Police Department obtained a mandatory blood specimen from Mr. Hughes at 3:20 a.m.

g. John Hooper's testimony

Mr. John Hooper is a security supervisor at De Tar hospital in Victoria, Texas. On December 11, 2004, he was called into the hospital by Mr. Daniel Garza, the security officer on duty that night. As Mr. Garza was the husband and father of the victims involved in the accident, he asked Mr. Hooper to come into the hospital to help him. When he arrived at the hospital, Mr. Hooper found out that Mrs. Garza had died in the accident. Mr. Hooper informed Mr. Garza that his wife had died and he relieved Mr. Garza of his weapon.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 12

Mr. Hooper observed Mr. Hughes being brought into the hospital by four Emergency Medical Technicians. He observed that Mr. Hughes was out of control, despite being handcuffed to a stretcher. Mr. Hughes was belligerent, yelling, and had a strong smell of alcohol.

h. Dr. Ashraf Mozayani, Pharm. D., Ph.D.'s testimony

Dr. Ashraf Mozayani, Pharm. D., Ph.D., is the Chief Toxicologist of Harris County, Texas and a board certified forensic toxicologist with an impressive curriculum vitae. Dr. Mozayani performed an extrapolation analysis of Mr. Hughes' blood alcohol content for the night of December 11, 2004. Dr. Mozayani reviewed witness statements, police reports and other documentary evidence. She also reviewed analyses on two blood specimens. The first blood specimen was analyzed by De Tar hospital using blood serum rather than whole blood. It was taken at 1:49 a.m. and showed a blood alcohol content of 214.7 mg/dl. The other specimen was taken by the Victoria Police Department at 3:20 a.m. The Texas Department of Public Safety analyzed that sample and determined that Mr. Hughes' blood alcohol content was 0.17 grams of alcohol per 100 milliliters of blood.

Using standard analysis, and generally accepted procedures and assumptions, Dr. Mozayani determined that Mr. Hughes' alcohol content was greater than 0.20 grams of alcohol per 100 milliliters of blood at the time of the accident and greater than 0.19 grams of alcohol per 100 milliliters of blood around the time of his last drink at 11:00 p.m. The standard which is considered legal intoxication in Texas is 0.08 grams of alcohol per 100 milliliters of blood, and Mr. Hughes' levels were more than twice, almost three times, that amount. In lay persons terms, Dr. Mozayani stated that Mr. Hughes was "completely drunk in the bar, in the accident and in the hospital." With this level of intoxication, Dr. Mozayani testified that Mr. Hughes would have showed noticeable signs of intoxication, including slurred speech, belligerence, and tendency to get into arguments.

The scientific evidence which determined the amount of alcohol in Mr. Hughes' system supported and was consistent with the witness statements, which stated that he was showing obvious

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 13

signs of intoxication. Dr. Mozayani testified that most individuals with this amount of alcohol in their system, would be obviously intoxicated. While Dr. Mozayani admitted that in some cases individuals with this level of intoxication do not exhibit obvious signs, in this case the witness statements seemed accurate.

Dr. Mozayani testified that the amount of alcohol in Mr. Hughes' system was so great that a discrepancy of one or two drinks would not make a significant difference, so that if the witnesses did not agree as to the number of drinks Mr. Hughes consumed, and she reduced the number of drinks consumed in her analysis by one or two drinks, Mr. Hughes would have still been intoxicated and showed signs of it.

In fact, Dr. Mozayani determined that Mr. Hughes' intoxication level showed that he consumed more alcohol than accounted for by the witness statements, leading her to believe that either the witnesses did not see all the drinks consumed by Mr. Hughes or that the establishment serve more alcohol in its drinks than standard amounts.

Dr. Mozayani testified that individuals with alcohol in their system are twenty five times more likely to cause accidents than drivers who have not been consuming alcohol. An individual with an alcohol concentration of .20 would have suffered a significant amount of impaired perception and a loss of judgment.

i. Sean Schubert's testimony

Mr. Sean Schubert is the General Manager of Barney's Billiard Saloon's 10 locations, including the Victoria location. Mr. Schubert testified that the drink known as a Long Island Iced Tea contains four kinds of alcohol: vodka, gin, rum and triple sec. Barney's serves two sizes of

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 14

drinks, a 23 ounce specialty "hurricane" glass and a smaller glass.⁷ The standard alcohol content for a Long Island Iced Tea in a specialty glass is two and one quarter ounces of alcohol. Barney's sold the specialty drink for \$9.75 during the time of the incident, and allowed the customer to keep the glass. Barney's policy was to use a new glass each time a drink is served and to wash a souvenir glass for the patron, and bring another glass with a new drink. The patron gets to keep all the glasses purchased.

A "liquid cocaine" is a shooter, not a shot, that contains three kinds of alcohol, usually including bourbon. This drink contains two ounces of alcohol with juices or other mix in a four ounce glass without ice.

On cross examination, Mr. Schubert admitted that if a patron was served four specialty drinks over a period of an hour and fifteen minutes, that patron would have been over served, but he denied that the facts of this case fit that scenario.

j. TABC Agent Randy Myer's testimony

TABC Agent Randy Myer investigated the incident for the TAEC. On December 21, 2004, Agent Myer interviewed Mr. Sample. On that day, Mr. Sample told Agent Myer that he personally served Mr. Hughes two Long Island Iced Teas, one special and one regular. Mr. Sample told Agent Myer that the difference between the drinks was that a special Long Island Iced Tea had more alcohol than a regular. No criminal charges were made against any of the employees of Barney's for this matter.

2. ALJ's analysis

⁷ Mr. Schubert testified the kind of glass and amount of alcohol used by Barney's in a "regular" Long Island Iced Tea, as a 9oz. glass. However, Mr. Sample testified that unbeknownst to Mr. Schubert, the Victoria location used a larger 14 oz. glass for its "regular" drinks instead of the standard 9 oz. glass, because of a mis-shipment of glasses. Therefore Mr. Schubert's testimony about the size and alcohol content of the "regular" drink was not reliable in this case.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 15

Witnesses confirmed that Mr. Hughes was at Barney's sometime before 10:00 p.m., where he consumed one Long Island Iced Tea at the bar. At about 10:00 p.m., Mr. and Mrs. Hubbard arrived at Barney's. Mr. Hughes obtained another drink from the bar and moved to a pool table at 10:15 p.m.⁸ Mr. Hughes showed Ms. Wagner the drink he brought to the table. The preponderance of the evidence showed that Ms. Wagner served Mr. Hughes at least two more Long Island Iced Teas and one shooter of alcohol, over the next forty-five minutes to an hour.

During this time, Mr. Hughes was slurring his words, having trouble using a pool cue, had unsteady balance, and was argumentative. Mr. Hughes got into a five minute argument with Ms. Wagner over his change, and during which Mr. Hughes showed unsteady, almost falling, balance. Mr. Hughes was not served any food during this time. The evidence that Ms. Wagner saw or had to have seen Mr. Hughes' obvious signs of intoxication was unrefuted.

The preponderance of the evidence showed that Mr. Hughes was served his Long Island Iced Teas in a 23 oz. specialty glass. Mr. Sample claimed both that he did not serve Mr. Hughes, and also that he personally served two drinks, one special and one regular, to Mr. Hughes. Therefore his memory is not credible on this issue. Further, Mr. Schubert stated that it was the corporate policy of Barney's to use a new glass for each drink, but the Respondent did not show that the Victoria location adhered to this policy.⁹ Given Mrs. Hubbard's testimony that Mr. Hughes was always served in the specialty glass, Mr. Sample's unreliability, and Barney's tendency to deviate from corporate standards, Staff proved that it is more likely than not that Mr. Hughes' Long Island Iced Teas were all served in the 23 oz. specialty glass.

Ms. Wagner observed that Mr. Hughes' was served three Long Island Iced Teas which contained over twice as much (23 oz. x 3 = 69 oz.) than if he had been served Barney's standard size

⁸ Dept. Ex. 22

⁹ Mr. Sample admitted that the Victoria location used a larger standard glass for regular drinks (14 oz.) than standard for other Barney's locations (9 oz.), and therefore did not always adhere to corporate standards.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 16

drinks (9 oz. x 3 = 27 oz.).¹⁰ Although Barney's claims that in reality there is only a slight difference in alcohol content between the specialty and regular drink, Ms. Wagner should have also taken the size of the drinks served over the short period of time into account .

Mr. Hughes arrived at the pool table at 10:15 with a large drink in his hand. By 11:00, Ms. Wagner had served him two more large drinks and a shooter. Both the amount of alcohol served to Mr. Hughes over the short period of time, and Mr. Hughes physical demeanor should have lead Ms. Wagner to believe that Mr. Hughes was intoxicated by the time she served him his last drink. Staff has proved that Respondent's employee, Ms. Wagner, sold or served alcoholic beverages to Mr. Hughes, an intoxicated person, on December 11, 2004.

- B. Did Respondent, its agent, servant, or employee, sell, serve, or provide an alcoholic beverage to a person obviously intoxicated so that the person presented a clear danger to himself and others, and the intoxication was a proximate cause of the damages suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02, on December 11, 2004?**
- 1. Employees of Barney's served and sold alcoholic beverages to Mr. Hughes after he was obviously intoxicated to the point that he presented a clear danger to himself or others**

Mr. Hughes did not have the normal use of his mental or physical faculties, due to the ingestion of alcoholic beverages, by the time Ms. Wagner served him his last drink. After he got into the argument over change, it should have been apparent to Ms. Wagner that Mr. Hughes presented a clear danger to himself and others. He could not stand up straight, and used the pool table and chair for balance. At that point, she had ample opportunity to view Mr. Hughes' demeanor and obvious signs of intoxication. Ms. Wagner, as the only waitress who had been serving him at that time, should have been aware that he had consumed at least three large alcoholic beverages in about an hour and then he ordered a shooter. She should have been aware from her TABC-approved

¹⁰ Although the evidence showed that Mr. Hughes was served at least one other Long Island Ice Tea at Barney's, there is no evidence that Ms. Wagner knew of it.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 17

training class and experience as a waitress that most people are severely impaired, to the point of being dangerous to themselves or others, with that amount of alcohol in such a short period of time, and while exhibiting signs of intoxication. Mr. Hughes' condition was readily apparent to Mr. and Mrs. Hubbard, as they asked Mr. Hughes to let them take him home while he was still being served by Ms. Wagner.

Further, Mr. Sample, the manager, had the opportunity to view Mr. Hughes' demeanor that evening as well. Although he denies serving Mr. Hughes any beverages, he did observe Mr. Hughes being served by Barney's staff. Further, he observed Mr. Hughes attempting to initiate a fight with six other men. Mr. Sample believed that Mr. Hughes was the aggressor. He observed that Mr. Hughes was attempting to put a cigarette out on somebody. Mr. Hughes grabbed Mr. Sample and assaulted him. Mr. Hughes was yelling, cursing and he threatened to kill Mr. Sample. Although during his testimony Mr. Sample was defensive and certain that Mr. Hughes showed "zero signs" of intoxication, he was not credible given the other witness statements and the physical aggressiveness Mr. Sample observed toward the other individuals and toward Mr. Sample himself. Mr. Sample actually observed Mr. Hughes place himself and others in danger within minutes after he was served his last drink by Ms. Wagner.

2. Intoxication was a proximate cause of the damages

Lt. Sanderson's uncontroverted testimony is that Mr. Hughes' disregard of the stop sign caused Mr. Hughes' car accident. The accident happened less than five minutes after Mr. Hughes left Barney's, in a highly agitated and an intoxicated state. Dr. Mozayani testified that an intoxicated person is 25 times more likely to have an accident while driving and that Mr. Hughes would have been suffering a significant amount of impaired perception and a loss of judgment. The Respondent did not refute that Mr. Hughes' intoxication was a proximate cause of the accident, and the death of Mrs. Garza.

3. ALJ's analysis

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 18

The ALJ finds Staff proved Respondent's employee Ms. Wagner served Mr. Hughes after he displayed signs of intoxication that should have been apparent to her that he was intoxicated to the point that he was a danger to himself and others. The ALJ finds Staff also proved that Mr. Hughes' intoxication was a proximate cause of the car accident. Therefore, Staff has proved Respondent violated TEX. ALCO. BEV. CODE § 2.02 on December 11, 2004.

D. Is Respondent protected from TABC's action because Respondent complied with TEX. ALCO. BEV. CODE ANN. § 106.14(a), the "safer harbor" statute, on December 11, 2004?

1. Did the Respondent require its employees to attend a TABC-approved seller training program in accordance with TEX. ALCO. BEV. CODE ANN. § 106.14(a)(1) and did they attend in accordance with TEX. ALCO. BEV. CODE ANN. § 106.14(a)(2)?

a. Evidence

i. Employee policies set out attendance requirement

Mr. Schubert testified that the Respondent required its employees to attend a TABC-approved seller training program, as set out in Respondent's Liquor Policy, which states in part:

5. All employees must complete and pass an A.B.T. training class prior to employment.¹¹

Mr. Sample signed for receipt and acknowledgment of this policy on November 11, 2001, Ms. Wagner on November 7, 2004, and Ms. Britney Gibbs on September 25, 2002.¹²

ii. Respondent's employees actually attended training

¹¹ Respondent's Ex. 5.

¹² Respondent's Ex. 12, 13, and 15.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 19

All of Respondent's employees who worked the evening shift on December 11, 2004, when Mr. Hughes was on the premises, held seller-server certifications that were valid and current.¹³ Those employees were Ms. Wagner, Mr. Sample, Ms. Britney Gibbs, and Mr. Jesse Perez.

iii. Servers in question actually attended such a training program

Ms. Wagner attended a TABC seller training program on May 25, 2003, and her certification expired on May 24, 2005. Mr. Sample attended a program which certified him on August 23, 2003, through August 14, 2004.¹⁴

b. ALJ's analysis

The ALJ finds that Respondent meets the training program attendance requirement of the "safe harbor" statute as set out in TEX. ALCO. BEV. CODE ANN. § 106.14(a)(1), in that Respondent requires employees to be TABC-certified. All of Respondent's employees, including the servers, had actually attended TABC-approved training and held valid and current TABC-certifications on December 11, 2004 in accordance with TEX. ALCO. BEV. CODE ANN. § 106.14(a)(2).

3. Did Respondent directly or indirectly encourage the server in question to commit the violations at issue in this matter?

a. Did the Staff prove that an employee or agent of the Respondent, deliver or serve alcoholic beverages to a minor or intoxicated person, more than twice within a 12 month period?

The Staff argues that Barney's delivered or served to minors or intoxicated persons on September 10, 2004, December 11, 2004, and February 12, 2005, therefore the Department has proven that the Respondent directly or indirectly encouraged violation of the law.

¹³ Respondent's Ex. 2.

¹⁴ Respondent's Ex. 13 and 15.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 20

i. Evidence

TABC Sgt. Larry Liscomb testified about the violation history of Barney's. Sgt. Liscomb testified that Barney's had a record violation of selling to a minor on May 22, 2000. Barney's agreed to a suspension of its licenses for a period of three days or to pay a fine of \$450.00 in lieu of the suspension for that violation. Another violation occurred on March 1, 2002, where Barney's allowed a minor to possess or consume alcoholic beverages on site. Barney's agreed to a suspension period of seven days or the payment of a fine of \$1050. Sgt. Liscomb explained that neither of these cases were restrained by the Department. A restrained case is one in which the affirmative defense of the safe harbor statute is used by the licensee to avoid liability for the incident.

Barney's was served with an Administrative Notice that it had sold alcohol to a minor in violation of the law on September 10, 2004. Mr. Monshaugen, as attorney for Barney's, signed an agreement and waiver of hearing for this violation on September 23, 2004, in which he neither admitted or denied the violation occurred, but he waived Barney's right to a hearing on the matter.¹⁵ This case was restrained by the TABC Administrator on September 28, 2004, through a Violation Notice which specified the allegation, and that the server in question, Melanie D. Twilley, had attended a TABC approved seller training program. The Violation Notice specified that insufficient evidence existed to indicate that Barney's directly or indirectly encouraged said violation of the law.¹⁶ No penalty was imposed.

Another violation occurred on February 12, 2005, two months after the incident in this case. Ms. Britney Gibbs was served a notice of violation and arrested on February 12, 2005, for selling alcohol to an intoxicated person while she was a bartender at Barney's. Mr. Monshaugen, as attorney for Barney's, signed an agreement and waiver of hearing for this violation on March 10,

¹⁵ Department's Ex. 26 and 37, Respondent's Ex. 24.

¹⁶ *Id.*

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 21

2005.¹⁷ No penalty was imposed. The case was restrained by the TABC. The server in question, Britney Gibbs, had attended a TABC-approved seller training program, and the TABC found that insufficient evidence existed to indicate that Barney's directly or indirectly encouraged said violation of the law.¹⁸ Sgt. Liscomb stated that this case was handled by the district office of the TABC office in Houston as a convenience to the Respondent because the Respondent's attorney was located in Houston. Sgt. Liscomb testified that it is likely that the Houston office did not know that an investigation regarding the December 11, 2004 incident was on going. Also, TABC policy is to settle these kinds of cases within 30 days.

In the instant case, Agent Myer served an Administrative Notice for the violation on March 12, 2005, two days after the Agreement and Waiver was entered into between Barney's and the TABC for the February 12, 2005 violation.¹⁹ Agent Myer testified that the investigation into this case delayed the filing of the Administrative Notice. The instant case is considered a "source" case because there was not a TABC Agent at the establishment when it happened. The other cases considered above involved TABC Agents on site who observed the violations while they happened, therefore those cases were finalized within a short period of time. It is not uncommon for source cases like this one to require significant more time before an investigation can be completed and an administrative notice is issued. Sgt. Liscomb testified that the witnesses in this case, including Mr. Hubbard, refused to cooperate with the TABC and grand jury subpoenas had to be secured in order to obtain their statements. Sgt. Liscomb took witness statements in this case on February 18, 2004, but did not know about the February 12, 2004 violation at that time.

Sgt. Liscomb recommended that Barney's licenses be cancelled because the violation history showed three violations in a twelve month period. Sgt. Liscomb also recommended that the licenses should be cancelled because Mr. Hughes had been served alcohol by employees of Barney's when

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Department's Ex. 1

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 22

he was obviously intoxicated, and they should have known while he was being served that Mr. Hughes was intoxicated. The TABC standard penalty chart contained in TABC Rule §37.60 shows that for the second violation of selling alcohol to an intoxicated person, the standard penalty is a 20-25 day suspension. Sgt. Liscomb indicated that he believed that this case presents aggravating circumstances because the manager threw Mr. Hughes out of the establishment and into the parking lot, and thus deviation from the standard penalty chart is warranted.²⁰ The employees made no attempt to stop Mr. Hughes from leaving the establishment in a car. Sgt. Liscomb further believed that by threatening to call the police, a situation was created by the employees that greatly contributed to the accident. On cross examination, Sgt. Liscomb admitted that in every source case that resulted in a death that he had investigated, he has recommended cancellation of the permits.

ii. ALJ's Findings

The TABC contends that it proved three violations over a 12 month period, therefore it provided *prima facie* evidence that Barney's directly or indirectly encouraged a violation of the law. The Respondent contends that the Department has not proven three violations in a 12 month period, since one of the violations occurred after the case at hand.

It would, at first blush, seem unfair to hold the Respondent accountable for incidents that happened after the incident in this case. However, the Respondent is asserting an affirmative defense to shield itself from liability for serving alcohol to an intoxicated person. The violation on February 12, 2005, occurred two months after the incident. The same alcohol policies were in force, the same management and employees were working and basically everything was pretty much the same as it was on the night in question. Therefore, the violation on February 12, 2005 is relevant to this case.

TABC Rule §50.10(c) does not specify that the TABC must prove three violations in a 12 month period preceding the alleged violation. The issue is whether or not the Respondent directly

²⁰ TABC Rule §37.60(f) provides that any person responsible for assessing a penalty may deviate from the standard penalty chart if aggravating or mitigating circumstances are involved.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 23

or indirectly encourages its employees to violate the law, as part of an affirmative defense. All of the other provisions of Rule §50.10 deal with obvious failures where permittees have failed in their obligation to train and supervise their employees as they serve alcohol to the general public, such as failing to ensure that employees possess valid certificates of training, failing to ensure employees read and understand policies, and failing to post policies designed to prevent the sale of alcohol to intoxicated persons.²¹ Proof of any of these obvious failures make the affirmative defense more difficult for the permittee to establish. Rule §50.10(c) specifically provides a threshold number of violations, after which the TABC has determined that a permittee should have a more difficult time showing that it did not directly or indirectly encourage a violation of the law. All three violations here occurred during a six month period, with the instance case falling almost exactly in the middle, and thus seem to be the kind of obvious failure that Rule §50.10(c) was intended to address.

The ALJ determines that the Staff has proven that the Respondent has more than two violations in a 12 month period. Therefore, the Staff has established *prima facie* evidence that the Respondent has directly or indirectly encouraged violation of the relevant laws.

b. Manger and employee meetings and postings

Mr. Schubert provided notes from area supervisor meetings that were held twice a month in October, November, and December of 2004. These meetings appear to have been attended by Mr. Sample, except that Ms. Gibbs attended the meeting on October 7, 2004, and no attendance sheet is provided for the meeting on November 18, 2004. In the meetings, TABC related topics such as alcohol awareness, over serving and identifying customers were discussed. Prior to the incident, only the meeting on October 7, 2004, specifically discussed over selling alcohol, reminding managers to look for signs of intoxication and to count the number of drinks consumed.²² The other meetings

²¹ TABC Rule 50.10(d).

²² Respondent's Ex. 6

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 24

discussed verifying age and drinking while working.²³ The meeting on December 16, 2004, went into great detail about the policy for overselling.²⁴

Mr. Sample held employee meetings monthly using the notes from his supervisor meetings as discussion points. Outlines of the topics and sign in sheets for the meetings in July, August, October, November, and December of 2004, and January and February 2005, were included in the record. Ms. Wagner attended the November and December meetings.²⁵ In all the meetings, "alcohol awareness" was discussed. In most instances, no other information about what specifically was discussed is contained in the notes. On the December 4, 2004 notes from the employee meeting, under the heading "alcohol awareness" two items are listed: "No intoxicated persons will enter and Push food."²⁶

In January of 2005, "knowing when to say when, Managers. cut off, serve food" was discussed.²⁷ In February of 2005, "over serving, know the signs, offer food, and writes up for over serving" were discussed.

The parties did not dispute that Barney's had all proper postings of applicable TABC rules and regulations at the time of the incident.

c. Policies

²³ *Id.*

²⁴ *Id.*

²⁵ The ALJ assumes that for the months in which Ms. Wagner's name does not appear on the list she was not a Barney's employee, since she acknowledged receipt of the company's policies on November 7, 2004.

²⁶ Respondent's Ex. 6.

²⁷ *Id.*

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 25

Respondent offers its policies to show that it does not directly or indirectly encourage violations of the TABC rules and regulations. Barney's guidelines entitled 'Steps to Responsible Alcoholic Beverage Service' provide that no employee will serve alcohol to anyone to the point of intoxication, intoxicated persons will be urged to use alternative transportation, and employees are obligated to inform law enforcement when attempts to intervene fail.²⁸ Barney's policies provide that employees needed to be aware of the number of drinks consumed by customers, intoxicated persons should not be served, non-alcoholic alternatives should be offered, and a "red flag" code should be used to have managers determine whether a person is intoxicated and in need of further handling.²⁹

Mr. Schubert also testified that there were unwritten policies used by Barney's employees which allowed them to forgo asking for identification for customers who had previously provided identification, and also allowed servers to cut off customers without going to the manager. Mr. Schubert visited the Victoria location about twice a month.

Mr. Sample testified he actively enforced the Barney's policies as a part of his duties. He testified that he counted drinks, watched customers, and would confront them if he thought they were consuming too much. He stated he would require them to eat before they would be served additional alcohol if he was concerned about their condition. Mr. Sample sometimes used a "yellow" flag for customers that he was concerned about, although this procedure is not contained in Barney's written policies.

d. ALJ's analysis

There is no evidence that Respondent directly encouraged employees to serve intoxicated persons. Respondent's written policies, as set forth in its employee guidelines and liquor policy, and

²⁸ Respondent's Ex. 3.

²⁹ Respondent's Ex. 4, pg. 4.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 26

at monthly meetings, requires all employees are to be TABC-certified sellers, and that intoxicated persons and minors are not to be served alcoholic beverages.

Staff argues that Barney's indirectly encouraged violations of the law because its policies are inconsistent. It is troubling that Mr. Schubert admitted that there were some "unwritten" policies used by employees. This testimony came about when Mr. Schubert was asked if a server could cut off a customer when the written policies explicitly require servers to have managers make that decision. There easily could be a problem uniformly enforcing "unwritten" policies and adequately training employee as to what the "unwritten" policies are to avoid confusion with the actual written policies.

The Staff further argues that Barney's indirectly encouraged violation of the law because it did not enforce its policies. Enforcement of alcohol policies is a relevant consideration and failure to enforce them can constitute indirect encouragement of the law.³⁰ Respondent offered its policies, each employee's acknowledgment of the policies, the employee meetings, and Mr. Sample's testimony to show that it enforced them.

Staff argues that Barney's clearly did not enforce its written policies regarding intoxicated persons on December 11, 2004.

The evidence shows that Mr. Hughes' drinks were not counted, he was served after he showed signs of intoxication, the manager was not informed of Mr. Hughes' condition, Mr. Hughes was not offered food, and he was not offered alternative transportation. Mr. Sample called the police because of the assault, not because of Mr. Hughes' condition. Staff further argues that Mr. Sample, the manager on duty, could not actively enforce the policies that night since he was busy tending bar as well as managing.

³⁰ *Parker v. 20801, Inc.*, 2006 S.W. 3d (LWC-2989)(Tex. App.--14 Dist).

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 27

Mr. Hughes was obviously intoxicated while he was in Barney's. Mr. Sample did not notice Mr. Hughes' obvious signs of intoxication, and Ms. Wagner failed to bring them to his attention. Mr. Sample observed that Mr. Hughes got into a fight with six other men, and tried to put a cigarette out on one. He intervened, and requested Mr. Hughes to leave. Mr. Hughes attacked Mr. Sample, and a scuffle ensued. Mr. Sample and Mr. Whitfield physically removed Mr. Hughes from the bar, putting him outside on the ground. Mr. Whitfield stated that Mr. Hughes was yelling, cursing and threatening to kill Mr. Sample. These observations alone should have led Mr. Sample to believe that Mr. Hughes had been drinking and that he presented a danger to himself and others.

At the supervisor meeting on December 16, 2004 (five days after the incident), the notes state:

F. OVER SERVING

1. IT IS EVERY EMPLOYEES TO MAKE SURE OUR CUSTOMERS ARE NOT OVER SERVED
2. IF IT IS DETERMINED THIS MAY HAVE HAPPENED, DO NOT ALLOW THEM TO DRIVE!
 - A. OFFER TO CALL THEM A TAXI
 - B. OFFER TO CALL A FRIEND OF THEIRS TO RIDE THEM HOME
 - C. IF NOTHING ELSE CALL THE POLICE.*(sic)*¹

Ms. Wagner and Mr. Sample failed to adhere to Barney's policies as outlined in the manager's meeting on December 16, 2004. There is no evidence that Mr. Sample and Ms. Wagner considered it their duty to make sure that Mr. Hughes was not over served alcohol. No employee of Barney's offered to call a taxi or to have the people with Mr. Hughes drive him home that night. In fact, by removing Mr. Hughes, Mr. Sample made sure Mr. Hughes left the bar. By putting him in the parking lot first and then calling the police, he escalated the risk that Mr. Hughes would hurt himself or others. Mr. Sample had to know that Mr. Hughes could drive away, especially since he saw him first at the bar alone, and that mostly likely, he drove himself there. Mr. Sample had ample

³¹ Respondent's Ex. 6

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 28

opportunity to restrain Mr. Hughes, or to make some effort to ensure that he did not drive, but Mr. Sample made no efforts in that regard.

In addition to establishing that Barney's failed to enforce its policies on December 11, 2004, TABC offered evidence that Barney's had a pattern and practice of not enforcing its policies. Respondent argues that its violation history shows only four violations in its 13 year permittee status, therefore it has an established record of enforcing policies.

TABC offered the three violations within a 12 month period cited above as well as an apparent additional instance where a Barney's employee sold alcohol to an intoxicated person on January 12, 2004, and fired employee Jesse Perez because of the incident.³² The matter was handled internally by Barney's and the TABC was not notified. This is the only instance in the record where Barney's fired an employee for violating the law. On one hand, this instance could be seen as an effort by Barney's to police itself and enforce its policies. On the other hand, another incident so close on the heels of two others, should have made it obvious to Barney's that something was amiss. Another instance can be seen as further evidence of a continuing problem of lack of control during the time period of December 11, 2004. The Respondent should have seen the signs that it needed to develop and apply better institutional controls over the operation of its business.

There are four documented instances where Barney's employees either sold alcohol to a minor or to an intoxicated person in violation of the law, in September and in December of 2004, and in January and February of 2005. Four documented violations in a six month period of time shows that Barney's policies were not properly enforced and largely ignored by employees. The ALJ finds that Barney's failed to enforce its policies and thereby, the Respondent did not establish that it neither directly or indirectly encouraged its employees to violate the law.

V. CONCLUSION

³² TABC Ex. 46.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 29

Staff proved by a preponderance of the evidence that on December 11, 2004, Mr. Eric Hughes was served alcoholic beverages by employees of Respondent, including Ms. Christine Wagner, a waitress employed by Respondent. Staff proved by a preponderance of the evidence that Ms. Wagner continued to serve alcoholic beverages to Mr. Hughes even after he was intoxicated. Staff also proved by a preponderance of the evidence that Ms. Wagner served Mr. Hughes after Mr. Hughes was intoxicated to the point of being a danger to himself or others, and that his intoxication was the proximate cause of the car accident that resulted in the death of Ms. Cynthia Garza. Thus, Staff proved its allegations against Respondent.

Respondent did not meet the three prongs of the "safe harbor" statute, and it is not protected from imposition of a penalty by TABC regarding the allegations. The first prong is satisfied because Respondent proved that its employees were required to attend a TABC-approved seller-server training program. Respondent also satisfied the second prong of the "safe harbor" statute, because the evidence shows that all of Respondent's employees on duty on December 11, 2004, including Ms. Wagner, were TABC-certified servers.

The Staff proved that the Respondent has more than two violations in a 12 month period. Therefore, the Staff has established *prima facie* evidence that the Respondent had directly or indirectly encouraged violation of the relevant laws. *Prima facie* evidence forms a rebuttable presumption. Absent contradictory evidence, it becomes conclusive. Respondent failed to rebut this evidence. Respondent did establish that it had policies in place to prevent over serving customers, and that employees read and acknowledge the policies, and the policies were discussed during weekly meetings. Staff established that the Respondent failed to enforce its policies and had a pattern and practice whereby the policies were not enforced and were largely ignored by the employees. For the above-stated reasons, the ALJ finds that Respondent failed to establish that it did not directly or indirectly encourage its employees to violate the law.

Respondent asked Sgt. Liscomb about the TABC's standard penalty chart, 16 TAC §37.60, which recommends a 20-25-day suspension for the second time sale of an alcoholic beverage to an

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 30

intoxicated person. However, 16 TAC §37.60 is a recommendation for offers of settlement by TABC personnel and not binding on the ALJ.³³ Further, the penalty chart's recommendation is for a violation of §11.61(b)(14) of the Code. It does not address a violation of §2.02(b) of the Code.

The legislature has prescribed the appropriate sanction when the elements set out in §2.02(b) of the Code have been proved. The only sanction mentioned in that section of the statute is revocation of the provider's permits. Suspension was not included as an alternative in §2.02(b), although the legislature did provide for suspension in other places in the Code. When the legislature employs a term in one section of a statute and excludes it in another section, the term should not be implied where excluded.³⁴

Therefore, the ALJ recommends that Respondent's permits be cancelled.

VI. FINDINGS OF FACT

1. 311 Mockingbird Inc. d/b/a/ Barney's Billiard Saloon (Respondent) is the holder of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued by the TABC for the premises known as Barney's Billiard Saloon at 311 Mockingbird Lane, Victoria, Victoria County, Texas (Barney's).
2. On December 11, 2004, Mr. George Sample was working at Barney's as a manager and bar tender. Ms. Christine Wagner was working as a waitress and Ms. Britney Gibbs was working as a bar tender. Respondent required all its employees to obtain TABC-approved seller-server certificates.
3. Respondent's employees attended monthly meetings in which Respondent's policies against serving minors or intoxicated persons and procedures for preventing service to minors and intoxicated persons were discussed.
4. On December 11, 2004, Eric Hughes and Amanda and Jason Hubbard met at Barney's.

³³ 19 T.A.C. §37.60(g).

³⁴ *Laidlaw Waste Systems (Dallas) v. Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995)

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 31

5. Mr. Hughes arrived first and was served at least one large 23 oz. Long Island Ice Tea at the bar.
6. Mr. and Mrs. Hubbard arrived about 10:00 p.m. Mr. Hughes ordered another large Long Island Ice Tea at the bar, as well as drinks for Mr. and Mrs. Hubbard..
7. At about 10:15 p.m., Mr. Hughes and Mrs. Hubbard moved to a pool table, and Ms. Wagner was the waitress in charge of this table. Mr. Hughes showed Ms. Wagner his drink and told her to "keep them coming."
8. Ms. Wagner served Mr. Hughes at least two more Long Island Iced Teas and a shooter of "liquid cocaine" over the course of the next forty-five minutes to an hour.
9. Mr. Hughes demonstrated obvious signs of intoxication. He had an odor of alcohol and slurred speech. He could not hold the pool cue and he used his hands to put the ball in the pockets. He demonstrated unsteady balance, using the pool table and a chair to hold himself up. He became argumentative.
10. Ms. Wagner and Mr. Hughes got into a five minute argument about change. Mr. Hughes believed that he had paid Ms. Wagner with a \$100 bill. Ms. Wagner gave him change for a \$50 bill. Mr. Hughes had swaying balance and almost fell during the argument.
11. The shooter of "liquid cocaine" was served to Mr. Hughes after the argument he had with Ms. Wagner about change.
12. Mr. Hughes' intoxication was open to view, evident, and capable of being easily understood by Ms. Wagner, who had attended TABC seller-server training.
13. At about 11:00 p.m., Mr. Hughes initiated a verbal argument with six other men. Mr. Sample observed Mr. Hughes attempt to put a cigarette out on someone. Mr. Sample stepped in and asked Mr. Hughes to leave Barney's.
14. Mr. Hughes grabbed Mr. Sample's shirt and a scuffle ensued. Mr. Hughes was yelling, cursing and threatened to kill Mr. Sample.
15. Mr. Sample and Mr. Willie Whitfield physically removed Mr. Hughes from Barney's, putting him outside in the parking lot.
16. Mr. Hughes got into his vehicle, which was parked right next to the front door. Someone yelled out loud to call the police. Mr. Hughes sped out of the parking lot, spinning his tires and making an obscene gesture.

SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 32

17. It was apparent to Ms. Wagner and Mr. Sample that due to intoxication, Mr. Hughes' was suffering a significant amount of impaired perception and a loss of judgment rendering him a clear danger to himself and others.
18. Minutes after Mr. Hughes left Barney's just after 11:00 p.m., he disregarded a stop sign and caused an accident at the intersection of N. Vine and W. Constitution Streets in Victoria County, Texas, with a vehicle driven by Mrs. Cynthia Garza.
19. Mr. Hughes' intoxication and his resulting failure to stop at the stop sign and yield the right of way caused the accident. Mrs. Garza died at 12:20 a.m. as a result of injuries she suffered from the accident.
20. Mr. Hughes' alcohol content was greater than 0.20 grams of alcohol per 100 milliliters of blood at the time of the accident and greater than 0.19 grams of alcohol per 100 milliliters of blood around the time of his last drink at 11:00 p.m.
21. The Respondent failed to enforce its policies regarding over selling of alcohol on December 11, 2004. On that day, the Respondent served alcohol to an intoxicated person.
22. On September 10, 2004, the Respondent sold alcoholic beverages to a minor.
23. On February 12, 2005, Respondent sold alcohol to and intoxicated person.
24. The Respondent had more than two violations of selling alcohol to a minor or an intoxicated person within a 12 month period.
25. Respondent had a pattern and practice of not enforcing its policies and a lack of control over its business operations.
26. On May 20, 2006, TABC sent its Notice of Hearing to Respondent informed the Respondent that the hearing on the merits was set for July 17, 2006, and it contained: a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the Commission.
27. The hearing on the merits convened on July 17 and 18, 2006, at the State Office of Administrative Hearings (SOAH), 5155 Flynn Parkway, Suite 200, Corpus Christi, Texas, before Administrative Law Judge Melissa M. Ricard. TABC was represented by its staff attorney, W. Michael Cady. Respondent appeared through its attorney, Ronald A. Monshaugen. Evidence and argument were heard, and the record closed on August 18, 2006, after closing briefs and replies were submitted.

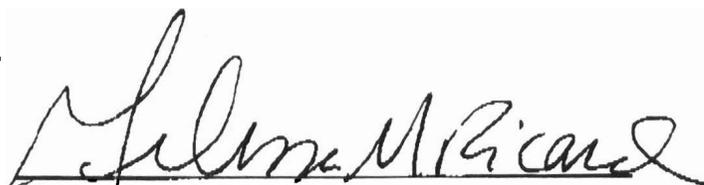
SOAH DOCKET NO. 458-06-1319

PROPOSAL FOR DECISION

PAGE 33

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
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, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. On December 11, 2004, Respondent's employee sold an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14), and to an obviously intoxicated person who presented a clear danger to himself and others, with the intoxication being a proximate cause of the damage suffered, in violation of TEX. ALCO. BEV. CODE ANN. § 2.02.
5. Based on Conclusion of Law No. 4, cancellation of Respondent's permits is warranted.

SIGNED October 16, 2006.

MELISSA M. RICARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS