

DOCKET NO. 515225

KK'S GROUP VENTURE INC.
D/B/A KK'S PUB
PERMIT NO. MB611124, LB

HARRIS COUNTY, TEXAS
(*SOAH DOCKET NO. 458-06-1728*)

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BEFORE THE TEXAS

ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of October 2006 the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened on June 23, 2006 and adjourned the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 12, 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. As of this date no exceptions have been filed.

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 that 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.

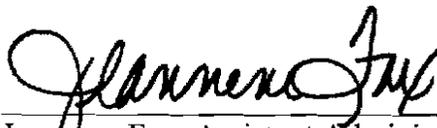
IT IS THEREFORE ORDERED by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's permit hereby **SHOULD NOT BE SUSPENDED OR CANCELLED**.

This Order will become final and enforceable on 27th day of November 2006 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 the 30th day of October 2006 at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

HON. JUDGE REX A. SHAVER
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

KK's Group Venture Inc.
d/b/a KK 's Pub
RESPONDENT
3918 Fairmont Parkway
Pasadena, Texas 77504
CERTIFIED MAIL NO. 7005 3110 0000 6411 2924

Clyde Burleson
ATTORNEY FOR RESPONDENT
6776 Southwest Freeway, Suite 620
Houston, Texas 77074
VIA FACSIMILE: (713) 785-0892

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Houston District Office

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61 (b)(2), TABC may suspend or cancel an original or renewal permit if it finds, after notice and hearing, that the following circumstance exists:

“The permittee violated a provision of this code or rule of the commission.”

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13), TABC may suspend or cancel an original or renewal permit if it finds, after notice and hearing that

“The permittee was intoxicated on the licensed premises.”

Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 104.01(5),

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

* * *

(5) being intoxicated on the licensed premises.”

III. EVIDENCE

A. Respondent's Permit

Respondent holds a Mixed Beverage Permit, MB-611124, which includes the Mixed Beverage Late Hours Permit, issued by TABC, for the premises located at 3918 Fairmont Parkway, Pasadena, Harris County, Texas. This permit was originally issued on October 12, 2005.

B. Testimony Regarding the Allegation

Thomas Chadwick testified that at 2:22 a.m., on December 10, 2005, he entered the licensed premises located at 3918 Fairmont Parkway, in Pasadena, Harris County, Texas. The permittee was doing business there as KK's Pub. He had gone to that location in his official capacity as an enforcement agent for TABC for the purpose of checking on possible after hours violations. Upon entering the premises he noted that there was no music playing, no patrons were visible, and the premises were being cleaned.

Mr. Chadwick related that he observed two men seated four to 5 feet apart at the bar and a woman standing behind the bar. He observed an open bottle of beer standing on the bar about 18 inches from the man he later identified as Norman Martin. Mr. Chadwick asked Mr. Martin if the beer was his. Mr. Martin denied knowing anything about it. Mr. Chadwick observed Mr. Martin to have the odor of an alcoholic beverage on his breath, red eyes, fumbling for his identification and having a slight stumble. Mr. Martin told Mr. Chadwick that he had consumed two beers. Mr. Chadwick observed some cash on the bar. Mr. Martin told him that he was an employee and was counting the night's receipts. Michael Lloyd Bolton, identified himself as the manager of KK's Pub and confirmed for Mr. Chadwick that Mr. Martin was working that night and was helping count the night's receipts. He stated that Mr. Martin had been an employee six months.

Mr. Chadwick testified that he was trained in administering the horizontal gaze nystagmus (HGN) field sobriety test. He administered the HGN to Mr. Martin and detected six clues. Mr. Chadwick explained that these six clues consisted of a lack of smooth pursuit in each eye, nystagmus prior to 45 degrees in each eye, and nystagmus at maximum deviation in each eye. Mr. Chadwick stated that based upon his observations he formed the opinion that Mr. Martin was intoxicated. There was no testimony as to the correlation between the HGN results and the blood alcohol level of Mr. Martin or his use of his normal mental or physical faculties. Mr. Chadwick also testified that Norman Martin was acting peacefully and was not belligerent, not slumped over in his seat, not falling out of his seat, and was not loud or violent.

IV. DISCUSSION AND RECOMMENDATION

The bone of contention in this case is which definition of “intoxication” is to be used when applying §§ 11.61(b)(13) and 104.01(5) of the Code. The Code does not define intoxication; however the Texas Penal Code (Penal Code) provides definitions for both “intoxication” and “public intoxication”.

The Penal Code § 49.01(2) defines “intoxication” as

“...not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances, or any other substance in to the body; or (B) having an alcohol concentration of 0.08 or more.”

The Penal Code § 49.02(a) provides that

“A person commits an offense if the person appears in a public place while intoxicated to the degree that the person may endanger the person or another.”

Both of these sections imply that there may be levels of alcohol in a person's system that do not amount to intoxication. The degree of intoxication set out in Penal Code § 49.01(2) means a level of alcohol in the system sufficient to make observable the effect on the mental and physical faculties of the person being observed. This definition of intoxication is commonly used in connection with intoxication offenses other than public intoxication. The public intoxication law establishes a definition unique to that offense. An offense occurs only if the person appears in a public place and is intoxicated “to the degree” that the person may endanger himself or others.

The evidence presented in this case is insufficient to prove that Norman Martin was intoxicated under either of the two definitions. While these observations may indicate some level of alcohol in Mr. Martin's system they fail to prove that he no longer had the normal use of his mental or physical faculties or was a danger to himself or others. Therefore the ALJ recommends that there be no suspension or cancellation of Respondent's permit.

V. PROPOSED FINDINGS OF FACT

1. On December 10, 2005, Respondent, KKS Group Venture Inc, d/b/a KK's Pub, was the holder of Mixed Beverage permit, MB-611124, which includes the Mixed Beverage Late Hours Permit, with premises at 3918 Fairmont Parkway, Pasadena, Texas.
2. On December 10, 2005, Norman Martin was an employee of KKS Group Venture Inc, d/b/a KK's Pub and engaged in his duties on the licensed premises
3. On December 10, 2005, Norman Martin was not intoxicated on the licensed premises of his employer, KKS Group Venture Inc, d/b/a KK's Pub.
4. On March 20, 2006 notice of hearing was sent to KKS Group Venture Inc, d/b/a KK's Pub by TABC. There were no contested issues of notice or jurisdiction
5. On June 23, 2006, a hearing convened before the State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex Shaver at 2020 N. Loop West, Ste. 111, Houston, Harris County, Texas. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Respondent appeared through its attorney, Clyde Burleson. Evidence was presented, and after the filing of written closing arguments the record closed on July 21, 2006.

VI. PROPOSED CONCLUSIONS OF LAW

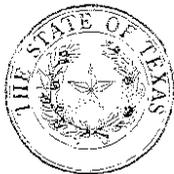
1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE and 61.13.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE §§ 2001.051 and 2001.052.
4. No violation the Texas Alcoholic Beverage Code was proven.
5. Based on Findings of Fact No .2 and No. 3 and Conclusion of Law No. 4, KKS Group Venture Inc, d/b/a KK's Pub's permit and license ~~should not be suspended~~ or cancelled.

SIGNED September 12, 2006.

A handwritten signature in black ink, appearing to read "Rex A. Shaver". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

**REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

September 12, 2006

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

VIA REGULAR MAIL

**RE: Docket No. 458-06-1728; Texas Alcoholic Beverage Commission v. KKS Group
Venture Inc. d/b/a KK's Pub**

Dear Mr. Steen:

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

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

Sincerely,

A handwritten signature in black ink that reads "Rex A. Shaver".

Rex A. Shaver
Administrative Law Judge

RAS/mc
Enclosure

xc: Ramona Perry, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, Texas 77008 - **VIA REGULAR MAIL**
Clyde Burleson, Attorney at Law, 6776 Southwest Freeway, Suite 620, Houston, Texas 77074 - **VIA REGULAR MAIL**