

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 22, 2008

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

VIA HAND DELIVERY

RE: Docket No. 458-08-2398; Texas Alcoholic Beverage Commission , Petitioner v. Ephren Stephens, Inc. d/b/a Remington's Bar and Grill, Permit/License Number MB571119, Travis County, Texas, Respondent

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 cursive script that reads "Catherine C. Egan".

Bill Zukauckas
Administrative Law Judge

BZ:nl
Enclosure

xc Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA HAND DELIVERY**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA HAND DELIVERY**
Michael Parr, Attorney, 4203 Kilgore Lane, Austin, TX 78727 - **VIA REGULAR MAIL**



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II. ALLEGATIONS AND APPLICABLE LAW

Respondent holds a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit for Remington's located at 20602 RR 1431, Suite 100 and 200, Lago Vista, Travis County, Texas 78645-4409. Staff alleges that on August 19, 2007, Respondent's employee, Ms. Cleaver, was intoxicated on the licensed premises. According to Staff, having an intoxicated employee on the licensed premise violated TEX. ALCO. BEV. CODE ANN. (the Code) §§ 104.01(5), 11.61(b)(13), 25.04, and 61.71(a)(1).

Section 104.01(5) of the Code states that "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: ... being intoxicated on the licensed premises." Section 11.61(b)(2) gives TABC authority to suspend for not more than 60 days or to cancel an original or renewal permit if it is found that the permittee "violated a provision of this code or a rule of the commission." Sections 25.04 and 61.71 extend this authority to wine and beer retailer's permits and to retail dealer's licenses.

III. WAS AN EMPLOYEE INTOXICATED AT REMINGTON'S?

A. Evidence

On August 19, 2007, the Lago Vista Police received an anonymous call reporting that Remington's bartender was serving alcohol while intoxicated. Ms. Cleaver was identified as the bartender. Officers Oestrick¹ and Louis Valdez arrived at Remington's in separate vehicles within a few minutes of the call. According to Officer Oestrick, when he walked into Remington's, Ms. Cleaver was sitting with some friends drinking a glass of wine. The officers did not see her tending bar or serving alcohol.

The officers asked Ms. Cleaver to step outside to discuss the matter. The interview was

¹ Officer Oestrick's first name is not in the record.

videotaped.² According to Officer Oestrick, Ms. Cleaver had glassy, blood-shot eyes, had a “bit” of slurred speech, and kept repeating her questions. Officer Valdez testified that Ms. Cleaver had slurred speech “kinda mush mouth,” was wobbly and stumbled, and repeatedly asked the officers the same questions. The videotape indicates otherwise. Ms. Cleaver’s speech was not slurred, and she did not wobble or stumble. Although she repeated her questions to the officers, the questions were appropriate to the situation.

Ms. Cleaver told the officers that, after she quit working, she had a glass and a half of wine and was not intoxicated. She told the officers that she had left Remington’s earlier in the evening to go out to dinner with her husband and had returned to the bar to complete the payroll paperwork. Ms. Cleaver explained that she had told the bartender to quit serving alcohol to Sarah Hardy and believed Ms. Hardy called in the anonymous complaint in retaliation.

Officer Oestrick asked Ms. Cleaver to perform the standardized field sobriety tests and she agreed. According to Officer Oestrick, Ms. Cleaver exhibited six out of six clues on the horizontal gaze nystagmus (HGN) test, and four out of eight clues on the walk and turn test but no clues on the one-leg stand test.

Although certified to administer the standardized field sobriety tests, Officer Oestrick had not administered them before this evening. When questioned about how long he was to hold the stylus out to the side to determine if nystagmus existed, Officer Oestrick equivocated and appeared uncertain. Although Officer Oestrick positioned himself so that his back was to the camera blocking most of the test, the videotape shows that Officer Oestrick moved the stylus quickly, less than two seconds out before bringing it back to center. While Officer Oestrick knew that wearing contacts could alter the results of the HGN test, he did not know how the wearing of contacts could alter the test results. Ms. Cleaver wore contacts on August 19, 2007.

Officer Oestrick further acknowledged that, although it is important for an officer to demonstrate both the walk and turn test and the one-leg stand test prior to asking the alleged intoxicated person to do each test, he did not show Ms. Cleaver how to do the one-leg stand and

² Ex. 3.

could not recall exactly what he showed her to do on the walk and turn test. The tape shows that Officer Oestrick did not properly demonstrate either test. Ms. Cleaver did what the officers told her to do. Officer Valdez was with Officer Oestrick during the tests, but he is not certified to perform the standardized field sobriety tests. Neither officer asked Ms. Cleaver to take a breath or a blood test to determine the amount of alcohol in her body.

B. ALJ's Analysis

The threshold issue is whether Ms. Cleaver was intoxicated while at Remington's on August 19, 2007. Ms. Cleaver admitted that over the course of the evening she drank one and a half glasses of wine. This does not establish that she was intoxicated. Staff had the burden of proving by a preponderance of the evidence that Ms. Cleaver was intoxicated while she was at Remington's.

Staff relies exclusively on the results of the standardized field sobriety tests. However, the evidence shows that the standardized field sobriety tests were not conducted properly. While Officer Oestrick was certified to conduct the tests, he had not done so since his initial training. Officer Valdez was not certified to administer these tests. The reliability of the HGN test results are questionable given that Officer Oestrick was unclear how long he had to hold the stimulus to determine the presence of nystagmus, how quickly he moved the stimulus from side to side, or the effect Ms. Cleaver's contacts may have had on the accuracy of the HGN test, if any.

In addition, Officer Oestrick did not properly demonstrate either the walk and turn test or the one-leg stand. On the videotape, Ms. Cleaver appeared to do what she was told and did not appear intoxicated—nervous and upset, but not intoxicated. For some unexplained reason, the officers never asked Ms. Cleaver to give a breath or blood test to determine if the concentration of alcohol in her body was greater than permitted by law.

Due to the questionable accuracy of the standardized field sobriety tests and Ms. Cleaver's sober appearance on the videotape, the ALJ finds that Staff did not prove that

Ms. Cleaver was intoxicated on August 19, 2007, and recommends that no suspension or penalty be imposed against Respondent.

IV. PROPOSED FINDINGS OF FACT

1. On August 19, 2007, Respondent Ephen Stephens Inc. doing business as Remington's Bar and Grill (Remington's) was and still is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit issued by the Texas Alcoholic Beverage Commission (TABC) for Remington's located at 20602 RR 1431, Suite 100 and 200, Lago Vista, Travis County, Texas 78645-4409.
2. On August 19, 2007, Respondent's manager for Remington's, Cheryl Cleaver, was at Remington's, but she was not serving alcohol.
3. On August 19, 2007, after working at Remington's on the payroll records, Cheryl Cleaver had a glass or two of wine.
4. On August 19, 2007, while at Remington's Ms. Cleaver had the odor of an alcoholic beverage on her breath and had bloodshot eyes. But, she did not have slurred speech or have any difficulty maintaining her balance.
5. Ms. Cleaver performed the standardized field sobriety tests; however, the tests were not properly administered.
6. On August 19, 2007, Ms. Cleaver was not intoxicated while on the licensed premises.
7. On April 4, 2008, Staff sent Respondent a Notice of Hearing.
8. The Notice of Hearing contained a statement of the time, date, location, and 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 relief sought by Petitioner.
9. On May 23, 2008, a public hearing was held at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas, before ALJ Bill Zukauckas. Staff Attorney Judith Kennison represented Staff. Attorney Michael Parr represented Respondent. The hearing was concluded that same day.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. §§ 1.06, 5.01, and 5.31, 6.01, 11.61, 25.04, and 61.71.

2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided to the parties. TEX. GOV'T CODE ANN §§ 2001.051 and 2001.052, TEX. ALCO. BEV. CODE ANN. § 11.63, and TEX. ADMIN. CODE § 155.55.
4. Based on the Findings of Fact, Respondent or his agent, servant, or employee was not intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 104.01(5); 11.61(b)13; 25.04; and 61.71(a)(1).
5. Based on Conclusion of Law No. 4, no adverse action should be taken against Respondent's permits.

SIGNED July 22, 2008.



BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING