

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 18, 2008

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

VIA REGULAR MAIL

RE: Docket No. 458-08-3438, Re: SCBTS INC. d/b/a Skooners

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,

Handwritten signature of B.L. Phillips in blue ink.

B.L. Phillips
Administrative Law Judge



BLP/vu

Enclosure

xc **Susan M. Stith, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA-REGULAR MAIL**
Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Mark Garland, SCBTS INC., 1617 University, Ste. A, Lubbock, TX 79401-4417 -**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-08-3438

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
	§	
V.	§	
	§	
SCBTS, INC.	§	OF
D/B/A SKOONERS,	§	
LUBBOCK COUNTY, TEXAS	§	
(TABC CASE NO. 568934)	§	ADMINISTRATIVE HEARINGS
Respondent	§	

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Petitioner) brought this disciplinary action against SCBTS Inc. dba Skooners (Respondent) alleging that, on or about July 20, 2007, Respondent, or his agent, servant or employee, sold, servcd, dispensed or delivered an alcoholic beverage to an intoxicated person, in violation of Texas Alcoholic Beverage Code (the Code) §§ 11.61(b)(14) and/or 61.71(a)(6). Based on the evidence, the Administrative Law Judge (ALJ) finds the Petitioner failed to prove the allegations by a preponderance of the evidence and recommends that no action be taken in regards to Respondent's permit.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute disciplinary action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. HEARING AND EVIDENCE

On July 7, 2008, a hearing was convened before ALJ B. L. Phillips, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W-3, Lubbock, Texas. Petitioner was represented by Susan M. Stith, attorney. Mark Garland appeared on behalf of Respondent and represented himself. The record closed the same day.

III. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to the Code § 11.61(b)(14), TABC may cancel or suspend a permit if it is found that the permittee sold, served, or delivered an alcoholic beverage to an intoxicated person. Section 106.14 states that, for the purposes of the provisions relating to sales, service, dispensing, or delivery of alcoholic beverages to a minor or intoxicated person, the actions of an employee who sold, served, dispensed, or delivered an alcoholic beverage to a minor or an intoxicated person shall not be attributable to the employer if: (1) the employer requires its employees to attend a seller training program; (2) the employee has actually attended the program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law.

IV. DISCUSSION AND ANALYSIS

A. Background

It is undisputed that, on July 20, 2007, Respondent's employee Carolina Arellanos sold alcoholic beverages to a patron by the name of Jonathan Martinez and that Mr. Martinez was later arrested in the parking lot of the licensed premises for driving while intoxicated (DWI). Ms. Arellanos had attended a seller training program at the time of the incident.

B. Petitioner's Evidence and Contentions

Petitioner offered into evidence three exhibits, including the Notice of Hearing issued in the case, the Respondent's permit history, and the report of the agent involved in the investigation. All offered exhibits were admitted into evidence. Petitioner also offered the testimony of Officer Christopher Paine of the Lubbock Police Department and Agent Anthony Bates and Sgt. Michael Lockhart of the TABC.

Officer Paine testified that he observed Mr. Martinez operating a motor vehicle while leaving the parking lot of the licensed premises and driving on a public street in Lubbock, Texas, while almost causing a collision with Paine's patrol vehicle. Officer Paine stopped him, conducted a DWI investigation, and then arrested Mr. Martinez after he determined that he was intoxicated. Mr. Martinez admitted to Officer Paine that he was just leaving the licensed premises where he had four skooners, so Officer Paine entered the licensed premises to further investigate. He made contact with Carolina Arellanos, who was identified as the waitress who served Mr. Martinez, and she admitted to serving Mr. Martinez approximately five to six skooners of beer. Officer Paine testified that Ms. Arellanos admitted that she knew Mr. Martinez was intoxicated when he left the licensed premises and she offered to call a taxi for him. As far as Officer Paine recalled, Ms. Arellanos did not tell him that Mr. Martinez left the licensed premises earlier and then returned prior to his arrest. Officer Paine admitted that his conversation with Ms. Arellanos was brief, probably less than five minutes, and the licensed premises were busy that night.

Agent Bates testified that he received Officer Paine's report regarding the incident and a TABC complaint was issued after review. Ms. Arellanos did not provide a statement to TABC during the investigation. But she provided a statement approximately three months afterwards in which she stated that Mr. Martinez left the licensed premises and returned intoxicated, whereupon Ms. Arellanos offered him water and a cab ride home. Agent Bates went to the licensed premises on September 29, 2007, where he met with the on-duty manager, Chase Crowder, who was unsure of what "seller-server" training was and who was unable to show the posted rules in the establishment.

Sgt. Lockhart testified that Ms. Arellanos' statement dated December 3, 2007, appeared to have been a planned, not spontaneous, statement and could have been given as the result of pressure from her employer. He stated that Respondent had a good record prior to this incident, but there have been other reports of sales to intoxicated persons and minors at the licensed premises that have not resulted in a TABC complaint. Sgt. Lockhart stated that Mr. Crowder was recently the subject of a TABC complaint of an intoxicated employee on the licensed premises. Finally, he recommended a twenty-day suspension of Respondent's permit because of the aggravating circumstances of Ms. Arellanos' failure to provide a timely statement during the investigation, which appeared to him to be an interference with the investigation.

C. Respondent's Evidence and Contentions

Respondent offered into evidence the testimony of Carolina Arellanos, Chase Crowder, Daniel Martinez and Stephen Johnson, all employees of the licensed premises. Ms. Arellanos testified that Jonathan Martinez entered the licensed premises at approximately 4:30 p.m. and left around 9:00 p.m., and she served him approximately five to six beers and some food during that time. He later returned to the licensed premises and appeared intoxicated, so she told him, "I think you are done," and offered him water and a cab ride home. Mr. Martinez sat down while Ms. Arellanos returned to work, and she then saw him leave and get pulled over by police. Ms. Arellanos denied that Mr. Martinez was intoxicated when he left the licensed premises after she served him alcoholic beverages; she was aware that he was intoxicated when he returned later that night. She testified that she was seller trained the entire time she has worked for Respondent.

Mr. Crowder testified that, when arriving at work at approximately 5:00 p.m., he observed Jonathan Martinez on the licensed premises. He recalled that Mr. Martinez was drinking and probably eating, he left the licensed premises, and then returned a couple of hours later. Mr. Crowder testified that Mr. Martinez was heavily intoxicated when he returned, and Ms. Arellanos gave him water to drink before he left again. He denied that he was familiar with the term "seller-server certified" but was familiar with the term "TABC certification" instead.

Daniel Martinez works at the licensed premises as a cook and also helps clean up. He testified that he spoke to Jonathan Martinez on the licensed premises at approximately 8:00 p.m., and he did not appear to be intoxicated. Daniel Martinez was working at the licensed premises that night and observed Jonathan Martinez return after 10:00 p.m., wearing different clothing and apparently not sober. He testified that he told Ms. Arellanos that Jonathan Martinez did not need to be served and that Ms. Arellanos said that she gave him water.

Stephen Johnson works at the licensed premises as the bar manager. He testified that he observed Jonathan Martinez on the licensed premises at approximately 5:00 p.m. and again when he returned. He recalled that Jonathan Martinez appeared intoxicated when he returned.

D. Analysis

The preponderance of the evidence does not support a finding that Respondent, or his agent, servant or employee, sold, served, dispensed, or delivered an alcoholic beverage to an intoxicated person on the night in question. The only evidence in support of such a finding is the testimony and report of Officer Paine of the Lubbock Police Department, made pursuant to the DWI investigation of Jonathan Martinez, which is insufficient to support such a finding. There is no doubt that Mr. Martinez was intoxicated that night and that Officer Paine was doing his job to follow up on the DWI investigation by talking to the waitress who served Mr. Martinez alcoholic beverages prior to his arrest. According to Officer Paine's testimony, that interview lasted less than five minutes and occurred while the waitress, Ms. Arellanos, was still working and quite busy. It appears that Officer Paine was focused on DWI offense because the brevity of the interview. The TABC agent attempted to carry the investigation to the next level for the TABC complaint by getting a statement from Ms. Arellanos, but the investigation concluded before she made such a report. When her report was received, it set forth facts leading to the conclusion that she did not serve alcoholic beverages to Jonathan Martinez while he was intoxicated. Her testimony and the testimony of other employees on the licensed premises that night supports such a conclusion.

Petitioner argued that Ms. Arellanos' statement was suspect because of the length of time that it took to be produced, the possibility that she was pressured by her employer, and the changes in the detail that she gave in the report from what she told Officer Paine that night. While these factors may cause TABC to view the report with some suspicion, they are insufficient to prove that Ms. Arellanos or any other of the witnesses gave false testimony. On the other hand, it would require a considerable amount of orchestration for Respondent to get four of his employees together to fabricate a story simply to avoid the administrative penalty. The witnesses appeared credible and their testimony was consistent to prove that Jonathan Martinez was not intoxicated when he left the licensed premises the first time.

V. RECOMMENDATION

Having reviewed all the evidence, the ALJ finds that the evidence was insufficient to prove that, on or about July 20, 2007, Respondent, his agent, servant or employee, sold, served, dispensed or delivered an alcoholic beverage to an intoxicated person and recommends that no action be taken against Respondent's permit.

VI. PROPOSED FINDINGS OF FACT

1. SCBTS Inc dba Skooners, Lubbock County, Texas, holds Permit No. MB422585, LB, CB, PE, issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 1617 University, Suite A, Lubbock, Lubbock County, Texas.
2. Respondent received proper and timely notice of the hearing from the TABC in a notice of hearing dated June 18, 2008.
3. The hearing on the merits convened July 7, 2008, at the State Office of Administrative Hearings, 8212 Ithaca, Suite W3, Lubbock, Lubbock County, Texas. The TABC was represented by attorney Susan Stith. Mark Garland appeared on behalf of Respondent and represented himself. The record closed on the same day.
4. On or about July 20, 2007, Respondent employed Carolina Arellanos at the licensed premises.

5. On that same date, Jonathan Martinez entered the licensed premises and purchased beer from Ms. Arellanos.
6. Mr. Martinez left the licensed premises after drinking five to six schooners of beer.
7. Ms. Arellanos and other employees of the licensed premises observed that Mr. Martinez was not intoxicated when he left the licensed premises at that time.
8. Mr. Martinez later returned to the licensed premises, and Ms. Arellanos and other employees observed at that time that he was intoxicated.
9. During Mr. Martinez's second visit to the premises, Ms. Arellanos refused to serve any alcoholic beverages to him, instead offering him water and a cab ride home.
10. Mr. Martinez left the licensed premises and was subsequently arrested for driving while intoxicated.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 61.71, and 61.73.
2. SOAH has jurisdiction to conduct the 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 ANN. ch. 2003.
3. Notice of the hearing was provided as required by the TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Based upon Findings of Fact No. 4-10, Petitioner failed to prove by the preponderance of the evidence that Respondent violated the Code by having an agent, servant, or employee who sold, served, dispensed, or delivered an alcoholic beverage to an intoxicated person on July 20, 2007.
5. Based on the foregoing, the ALJ recommends that no action be taken with regards to Respondent's permit.

SIGNED: JULY 18th, 2008



B. L. PHILLIPS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS