

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 6, 2009

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

VIA INTERAGENCY MAIL

RE: Docket No. 458-08-3219; Texas Alcoholic Beverage Commission v. Sportswest Family Center LTD. D/B/A Sportswest Permit No. MB-612387 Guadalupe County, Texas (TABC case NO. 574356)

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,


Steven M. Rivas
Administrative Law Judge

SMR/jh
Enclosure

xc Emily Helm, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA

INTERAGENCY MAIL

Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA

MAIL INTERAGENCY MAIL

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA

INTERAGENCY MAIL Exhibits returned: 1 cassette tape dated 7-29-08 & 1 data CD dated 1-7-09

Dewey Brackin, Gardere, Wynne, Sewell, LLP, 600 Congress Avenue, Suite 3000, Austin, TX 78701 - VIA

REGULAR MAIL

SOAH DOCKET NO. 458-08-3219

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	
	§	
SPORTSWEST FAMILY CENTER,	§	OF
LTD. D/B/A SPORTSWEST	§	
PERMIT NO. MB-612387	§	
GUADALUPE COUNTY, TEXAS	§	
(TABC CASE NO. 574356),	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Staff or TABC) requested that the permit of Sportswest Family Center, Ltd. d/b/a Sportswest (Respondent or Sportswest) be canceled, because Respondent or its employees violated the Texas Alcoholic Beverage Code and TABC rules by serving an intoxicated person on June 1, 2007; by operating in a manner that negatively affects public welfare and safety; and by selling or delivering an alcoholic beverage to a person who was obviously intoxicated. The Administrative Law Judge (ALJ) finds Staff failed to prove Respondent sold or delivered an alcoholic beverage to a person who was obviously intoxicated. However, the ALJ finds Staff proved Respondent sold or delivered an alcoholic beverage to an intoxicated person and that Respondent operated in a manner that was in patent disregard of the general welfare and safety of the people by failing to monitor the number of beverages it served to its customers. The ALJ finds Respondent's permit should be suspended for 30 days.

1. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened January 7, 2009, at the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Fourth Floor, Austin, Texas, before ALJ Steven M. Rivas. TABC was represented by its staff attorney Emily Helm. Respondent appeared through its attorney

Dewey Brackin. Evidence was presented, and the record closed on May 13, 2009, after the submission of written closing arguments.

II. BACKGROUND

Respondent is the holder of a Mixed Beverage Permit (MB612387)¹ issued by TABC for the premises known as Sportswest, which is located at 308 Highway 46 South, Seguin, Guadalupe County, Texas.

Most of the facts are not in dispute. On June 1, 2007, several employees of Cavco Industries Inc. (Cavco), in Seguin, Texas, went to Sportswest after work. The workers included Jose Roel Amaya (J.R.), Epi Guevarra, Jose DeLeon, Lauren Neumann, and Amber O'Brien. The employees arrived between 4:00 p.m. and 6:00 p.m.

Throughout their stay at Sportswest, the Cavco employees ordered and consumed various alcoholic beverages including mixed drinks, beer, and tequila shots. The employees initially sat at a large table near some pool tables where they socialized and drank alcoholic beverages. Eventually, they left the big table to play pool or watch others play pool. At some point, they migrated away from the pool tables and into an area where Sportswest has bowling lanes. Some Cavco employees bowled while others merely watched. All continued to drink and socialize.

At about 11:00 p.m., J.R. left Sportswest in his truck. Approximately 30 minutes later, he veered into oncoming traffic on Highway 123 in Guadalupe County and struck two vehicles. The first vehicle J.R. struck was being towed by another vehicle and was unoccupied. The second vehicle contained six family members including three children under the age of five. J.R. was killed in the accident as was the entire family in the second vehicle.

¹ TABC Ex. 2.

Department of Public Safety (DPS) Trooper Gregory Hendry investigated the crash scene and testified it was the worst accident in Guadalupe County history. Trooper Hendry also ordered a sample of J.R.'s blood be taken to measure his blood alcohol concentration (BAC) level. The test revealed J.R. had a 0.24 BAC level.

TABC Agent Russell Moore investigated the circumstances of the accident and the events leading up to the accident. Agent Moore issued an administrative violation (Code 561) against Sportswest for sale of an alcoholic beverage to an intoxicated person.

III. ALLEGATIONS, APPLICABLE LAW, AND PENALTY

A. Allegations

Pursuant to the Notice of Hearing issued by TABC on June 3, 2008, Sportswest is alleged to have committed the following violations:

1. Violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)

Staff alleges that on June 1, 2007, Respondent or 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).

2. Violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7)

Staff alleges that the place or manner in which the permittee conducts its business warrants the cancellation or suspension of its permit based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, because on June 1, 2007, Respondent had no system in place to monitor the number of alcoholic beverages it served to its customers in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).

3. Violation of TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) and (2)

Staff alleges that on June 1, 2007, Respondent or its agent, servant, or employee sold or delivered an alcoholic beverage to a person who was obviously intoxicated in violation of TEX. ALCO. BEV. CODE ANN. § 2.02.

B. Applicable Law

1. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee sold or delivered an alcoholic beverage to an intoxicated person.

2. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7)

The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

3. TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) and (2)

Providing, selling, or serving an alcoholic beverage may be made the basis of a statutory cause of action under this chapter and may be made the basis of a revocation proceeding under Section 6.01(b) of this code upon proof that at the time the provision occurred it was apparent to the provider that the individual being sold, served or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

C. Penalty**1. TEX. ALCO. BEV. CODE ANN. § 11.62(b)(2)**

Under TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2), the commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of this code or a rule of the commission.

2. TEX. ALCO. BEV. CODE ANN. § 601(b)

Under TEX. ALCO. BEV. CODE ANN. § 601(b), a license or permit issued under this code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this code or a rule by the commission.

3. TEX. ALCO. BEV. CODE ANN § 11.64(b)

As set out in TEX. ALCO. BEV. CODE ANN. § 11.64(b), the commission or administrator may relax any provision of the Code relating to the suspension or cancellation of the permit or license and assess a sanction the commission or administrator finds just...

4. TEX. ALCO. BEV. CODE ANN. § 11.64(c)(5)

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64(c)(5), the following circumstance justifies the application of subsection (b): that the permittee or licensee has demonstrated good faith, including the taking or actions to rectify the consequences of the violation and to deter future violations.

IV. EVIDENCE AND ANALYSIS

A. On June 1, 2007, did Respondent or its employee sell or deliver an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14)?

1. Evidence

a. Testimony of Epi Guevara

Mr. Guevara worked at Cavco in the flooring department² and testified that on June 1, 2007, the “actual production” at Cavco was shut down around noon, in order to allow the employees an opportunity to clean and organize the shop in preparation for inventory the following day. According to Mr. Guevara, his supervisor Wayne Davidson gave him a ride to Sportswest, and they arrived at approximately 6:00 p.m.

Mr. Guevara remembered that he and Mr. Davidson were the last Cavco employees to arrive at Sportswest. According to Mr. Guevara, all the employees “were already having drinks” when he arrived. Mr. Guevara recalled a conversation he had with J.R. and Mr. Davidson around 7:30 p.m. near the pool tables at Sportswest wherein J.R. became “boisterous” and began telling Mr. Davidson that he could do a better job than Mr. Guevara.³

During this same conversation, J.R. ordered three tequila shots; one for himself, one for Mr. Guevara, and one for Mr. Davidson. Mr. Guevara and Mr. Davidson declined the shots, so J.R. proceeded to have all three to demonstrate how “a real man drinks tequila.” According to Mr. Guevara, J.R. became aggressive and loud and more insistent with Mr. Davidson about getting Mr. Guevara’s job. J.R. ordered another round of tequila shots, which Mr. Guevara and Mr. Davidson again declined.

² Mr. Guevara is now a truck driver with Warner Enterprises.

³ During this time at Cavco, Mr. Guevara was being considered for a promotion, but apparently could not take the new position until his position in the flooring department was filled. Mr. Guevara suggested that J.R. talk to Mr. Davidson about taking over his job in flooring.

“From that point on,” Mr. Guevara testified, J.R. “started to get real obnoxious [and use] profanity.” Mr. Guevara stated J.R. then started to “cuss, cuss, cuss.” Mr. Davidson told Mr. Guevara “to calm [J.R.] down.” It was at this point Mr. Guevara testified that he told a waitress “no more shots,” and that “he’s done,” referring to J.R.

Eventually, Mr. Guevara and J.R. made it to the bowling lanes at Sportswest. According to Mr. Guevara, he threw away J.R.’s half-empty beer bottle while J.R. was in the restroom. Mr. Guevara also remembers telling co-worker Amber O’Brien that J.R. was “done.”

Mr. Guevara used the restroom after J.R. and recalls seeing J.R. with another beer in his hand when he returned from the restroom. At this point, Mr. Guevara testified that he “physically got the waitress...by the elbow” and asked “why does [J.R.] have a beer?” According to Mr. Guevara, the waitress told him “he didn’t get it from me.” Mr. Guevara proceeded to throw that beer away while J.R. went to rent bowling shoes. According to Mr. Guevara, he again told Ms. O’Brien, a co-worker, that J.R. “had too much to drink.”

Shortly thereafter, Mr. Guevara left the bowling lanes to talk to Mr. Davidson briefly. He said that when he arrived back at the bowling lanes, J.R. had yet another beer. Mr. Guevara testified that he “gave up” at that point and asked Ms. O’Brien why J.R. had another beer. According to Mr. Guevara, he told the other employees to “take care” of J.R., and he eventually left Sportswest just before 10:00 p.m.⁴ on foot.

Mr. Guevara admitted that while at Sportswest, he consumed 10 – 12 beers and was in no condition to drive.⁵ Mr. Guevara also testified that he believed he and J.R. were both intoxicated while at Sportswest.

⁴ According to a receipt (TABC Ex. No. 3), Mr. Guevara closed his tab at 22:46 or 10:46 p.m. However, the parties stipulated the time readout on the receipts at Sportswest was one hour ahead, making it 9:46 p.m. when Mr. Guevara closed his tab.

⁵ Mr. Guevara lives approximately ½ mile from Sportswest and intended to walk home from the moment he arrived.

b. Testimony of Joey DeLeon

Mr. DeLeon testified that he knew J.R. since preschool, and that they both grew up in Nixon, Texas. He worked in the same department with J.R. at Cavco and recalls leaving work at 3:30 p.m. with J.R. on June 1, 2007. According to Mr. DeLeon, he and J.R. arrived at Sportswest at 4:00 p.m. after cashing their checks on that date.

Mr. DeLeon also recalled Mr. Guevara being at Sportswest that night as he and J.R. moved from the big table to the pool tables and eventually to the bowling lanes. Mr. DeLeon remembered drinking the same amount of beer as J.R., somewhere in the “neighborhood of 15 or 16.” He said “it was more than a 12-pack of beer, easy.” Mr. DeLeon further stated he knew J.R. “was not sober” and that J.R. “drank a lot of beer.”

c. Testimony of D'Laine Amaya

Ms. Amaya was J.R.'s sister and recalls several conversations she had with J.R. on June 1, 2007. She remembers picking up J.R.'s truck at Sportswest to run an errand at around 4:00 p.m. and returning the vehicle to J.R. at 5:00 p.m. She testified he did not appear intoxicated during these two meetings.

Later, at approximately 11:00 p.m. Ms. Amaya talked to J.R. on the phone and offered to stop by Sportswest to pick him up.⁶ According to Ms. Amaya, J.R. told her “don't come pick me up, I'm fine.” Ms. Amaya asserted she knew he was not fine and “could tell by the way he was talking that he had been drinking too much.” Ms. Amaya further testified J.R.'s “speech was slurred” and she knew he was intoxicated.

⁶ Ms. Amaya was leaving Austin at that time and told J.R. she could go through Seguin on her way to Nixon, where they both lived with their mother.

d. Testimony of Lauren Neumann

Ms. Neumann works in the Human Resources department at Cavco.⁷ She recalled meeting other Cavco employees at Sportswest on June 1, 2007, but does not remember many details of that night. She did not remember if she went to Sportswest right after work, or if she rode alone or with someone else.

Ms. Neumann did not remember if she was drinking beer or mixed drinks that night, if her drinks were served by a waitress, or if she ordered her drinks from the bar. In addition, she did not recall thinking J.R. had too much to drink. She further believes that she was not intoxicated that night, and neither was her boss, Ms. O'Brien, or Mr. DeLeon.

On cross-examination, Ms. Neumann reiterated how little she remembered about that night. She did not remember how many drinks she had or how she paid for her drinks. She also did not recall if Sportswest had lunar bowling or standard bowling that night.⁸

Question by Ms. Helm: *In fact, my impression is you're just not sure about anything?*

Ms. Neumann: *And that is the most honest thing that you could say.*⁹

e. Testimony of Amber O'Brien

Ms. O'Brien works at Cavco as an office manager.¹⁰ She remembers entering Sportswest between 5:15 - 5:30 p.m. and recalls seeing a large table of Cavco employees in the same area where Mr. Guevara previously testified it was. From the time she arrived at Sportswest, Ms. O'Brien

⁷ Ms. Neumann is also seller-certified by the TABC and has been for eight years.

⁸ A photograph depicting lunar bowling (Respondent's Ex. 7M) shows bowling lanes illuminated by colorful moving lights, a mirror ball, and glowing pins. Under normal bowling conditions (Respondent's Ex. 7L), the lanes are illuminated with bright white fluorescent lights.

⁹ According to the Transcript page 177.

¹⁰ Ms. O'Brien was TABC seller-certified in the past, but did not know if her certification has expired.

testified she was “moving around” and “socializing” at the big table, the bar area, the pool tables, and eventually the bowling lanes.

She remembers J.R., Mr. DeLeon, Ms. Neumann, Mr. Guevara, and herself all going to the bowling lanes around the same time. However, she does not remember Mr. Guevara telling her that J.R. had too much to drink. Furthermore, she stated that nothing in her “interaction with J.R. that night” made her believe J.R. had too much to drink.

2. ALJ’s analysis

The Texas Alcoholic Beverage Code does not define “intoxication” for purposes of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14). According to Staff, the TABC has adopted a definition of intoxication as the loss of normal mental or physical faculties resulting from ingestion of alcohol or a blood alcohol concentration (BAC) greater than the level specified in TEX. PEN. CODE § 49.01(2) or 16 TEX. ADMIN. CODE § 50.2(a)(2)(A). Both authorities use 0.08 as the applicable BAC level.

Several SOAH decisions have addressed the definition of intoxication for purposes of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14). In SOAH Docket No. 458-03-4305, *TABC v. Tap Bar*, the ALJ noted that a “reasonably prudent person” should have known that a customer was intoxicated based on several indicators of intoxication observed by TABC agents. In SOAH Docket No. 458-06-1957, *TABC v. Riley*, the ALJ found a violation occurred where TABC agents observed several signs of intoxication on an individual who was served an alcoholic beverage. Additionally, in SOAH Docket No. 458-07-4008, *TABC v. Exit Stage Left*, the ALJ noted that the “objective reasonable person standard” should be used to determine whether the licensee should have known that a customer was intoxicated. As Staff noted in its closing argument, none of the above cases contained evidence of the patron’s BAC.

The ALJ believes an objective or reasonable person standard should be used in cases where there is no evidence of BAC. In this case, however, the ALJ finds direction in SOAH decisions where BAC evidence existed. In SOAH Docket No. 458-95-1754, *TABC v. Fay-Ray*, the ALJ found evidence that 0.10 BAC was “direct proof” of intoxication and held that it was “intoxication as a

matter of law.” In SOAH Docket No. 458-96-1008, *TABC v. Mansard*, the ALJ found that a person does not have a BAC level of (0.15) almost twice the limit set by the Penal Code without first having been intoxicated earlier in the evening. The ALJ also noted in *Mansard* that it would be “absurd to ignore the Penal Code definition of intoxication” in determining the definition of intoxication for purposes of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).

The ALJ finds that in cases where an individual is found to have three times (0.24 as in this case) the legal limit set out in the Penal Code, that person is presumed to have been intoxicated when a licensee or its agent sold or delivered an alcoholic beverage to that person.

Despite any evidence to the contrary, J.R. was intoxicated by any measure while at Sportswest on June 1, 2007. Based on the evidence, J.R. arrived at around 4:00 p.m. There is no evidence that he left Sportswest anytime before 11:00 p.m. This means he was at Sportswest for approximately seven hours drinking beer and tequila shots. Although there was some argument over the tequila shots, the ALJ believes Mr. Guevara’s detailed recollection about how J.R. ordered and consumed *at least* three tequila shots was credible.

The ALJ also found Mr. DeLeon’s testimony credible in that he and J.R. drank the same number of beers, that being 15 or 16. The ALJ found Ms. Neumann’s testimony mostly unreliable. She recalled so little about what happened at Sportswest that the ALJ gives no weight to her conclusion that J.R. was not intoxicated.

This leads to a reasonable conclusion that J.R.’s BAC level was much higher than the legal limit while at Sportswest. With a 0.24 BAC, J.R. was intoxicated as a matter of fact and law.

B. Does the place or manner in which Respondent conducts its business violate TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) and warrant the cancellation or suspension of its permit based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, because on June 1, 2007, it failed to monitor or control the consumption of alcoholic beverages by its customers?

1. Testimony of Sally Eckhart

Ms. Eckhart and her husband Lonnie Eckhart own Sportswest, which opened for business in August 2005. According to Ms. Eckhart, Sportswest has had only one other violation regarding “paperwork” that resulted in a warning. Ms. Eckhart testified that she works at Sportswest every day in several different capacities as a cook, bartender and front counter help.

On June 1, 2007, Ms. Eckhart and her daughter, Valerie Haskins-Sulma, were working at Sportswest in the bar and snack bar area. Normally, two people work behind the bar and one in the snack bar; however, according to Ms. Eckhart, Sportswest was “short” a bartender on that night. Ms. Eckhart testified that June 1, 2007 was an average Friday night with about 50-60 people in the bar. She also asserted that Sportswest has never had waitresses, although, the bartenders sometimes leave the bar area to clear off tables and throw away empty bottles. Ms. Eckhart testified that she does not remember J.R. being at Sportswest that night, nor does she remember serving three shots of tequila to anyone that night.

Ms. Eckhart admitted she did not have a written policy in place in June 2007 regarding service of alcohol. Nor did she have any “system” to track how many alcoholic beverages a customer had ordered or consumed. She asserted that her personal policy was that she would not serve a “drunk person” and that a customer would be cut off if they their “attitude” or “language” became “strange.”

Regardless, at the time of the hearing, Sportswest had implemented written policies on serving alcohol.¹¹ Those policies were put in place in November 2008. Additionally, Ms. Eckhart became TABC seller-certified in January 2009, a few days before the hearing.

¹¹ Respondent’s Ex. No. 5, “Ten Steps to Responsible Alcohol Beverage Service.”

2. Testimony of Valerie Haskins-Sulma

Ms. Haskins-Sulma is an assistant manager at a retail store in Houston, Texas. On June 1, 2007, she was helping her mother, Ms. Eckhart, at Sportswest as she had done on prior occasions. Ms. Haskins-Sulma described herself as a “jack-of-all-trades” because she would work in the bowling alley, prepare food, and assist in the bar and restaurant area. However, she asserted she has never waited tables, nor does she remember anyone grabbing her elbow that night. According to Ms. Haskins-Sulma, nobody else was monitoring the purchase of alcoholic beverages other than her and Ms. Eckhart.

As to any system in place on monitoring the purchase of alcoholic beverages, Ms. Haskins-Sulma testified “It’s just monitoring them. You don’t allow one person individually to take more than a certain amount. Of course, there’s no specific – I don’t have a set number, no, but I can honestly tell you I’m not going to serve an individual more than a specific amount of time that I am aware of.” Ms. Haskins-Sulma elaborated, “If, for instance, you were to come up to the bar and you ordered... a beer and you were back within five minutes, that’s unacceptable.”

When asked about how they monitor a person who has been at Sportswest for six hours, Ms. Haskins-Sulma testified “it would all depend on the person and how often they were coming back, on what we were – how we were keeping an eye on them.” Ms. Haskins-Sulma testified that patrons must come to the bar to order drinks, which gives the bartender an opportunity to observe them.

Question by Ms. Helm: *So you would have seen them time and time again if they drank or ordered several drinks?*

Ms. Haskins-Sulma: *Yes, if they were – yes, of course.*

Question by Ms. Helm: *So if they were continually drinking through the night, you would get to see them?*

Ms. Haskins-Sulma: *Yes.*¹²

¹² According to the Transcript page 246.

3. Testimony of Sgt. Pete Champion

Sgt. Champion has worked at the TABC for 30 years and is currently in charge of code enforcement for 13 counties, including Guadalupe County. Sgt. Champion testified that some kind of management or control is necessary to monitor and “cut off” a person who arrives at 4:00 p.m. and stays until 11:00 p.m. “in a continuous drinking mode.”

Sgt. Champion testified that in addition to not having a system in place to monitor the consumption of alcoholic beverages, Sportswest was inadequately staffed on June 1, 2007. Because Sportswest had “such a large area” where alcoholic beverages were served, Sgt. Champion asserted that two employees could not effectively monitor a Friday night crowd.

Sgt. Champion: ...I think just two people working selling and such a large place, that probably it was inadequate supervision.

*Question by Ms. Helm: So you're talking about per square footage?*¹³

*Sgt. Champion: [Yes]. Especially if the testimony is that they never came out from behind the bar other than maybe to police a table, ash trays, bottles or something like that.*¹⁴

4. ALJ's analysis

By not having a system in place and being understaffed to properly handle a Friday night crowd, Sportswest failed to properly monitor or control the alcohol consumption of its customers, including J.R., in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).

The parties generally agree the Code does not set forth a formula for determining a manner and place violation. Respondent argued in its written closing argument that “some unusual condition or situation must be shown so as to justify a finding that the place and manner in which a business would be conducted is against the general welfare, health, peace, morals, and safety of the people and

¹³ The actual square footage was not introduced. However, based on a fire alarm plan diagram (Respondent's Ex. No. 2), Sportswest is large enough to house a billiards room, a club area with a stage, a bar and snack bar, 20 bowling lanes, various offices and storage areas, and six restrooms—three for men and three for women.

¹⁴ According to the Transcript page 302.

of the public sense of decency.” In support of its position, Respondent cited two cases: *Bavarian Properties, Inc. d/b/a Club Legends v TABC*, 870 S.W. 2d 686 (Tex. App.—Fort Worth, Feb 16, 1994) and *TABC v. Mikulenska*, 510 S.W. 2d 616 (Tex. Civ. App.—San Antonio, May 29, 1974). Staff argued that these cases are not applicable because both deal with “original applications” for a permit. Staff further argued that the “grounds for cancelling an existing permit generally relate only to conduct that has occurred at the premises after the permit is issued,” and that “there are many ways in which a permit holder can conduct its business and be in violation of § 11.61(b)(7).”

The evidence reflects no system was in place on June 1, 2007, to adequately monitor the amount of alcohol the customers at Sportswest had consumed. Testimony from Mr. Guevara and Mr. DeLeon indicated they were either intoxicated or “buzzed” and had each consumed 12 or more beers while at Sportswest. The evidence also reflects that several Cavco employees were at Sportswest for at least six hours on June 1, 2007, drinking alcoholic beverages without any inquiry from the Sportswest staff as to their condition.

Furthermore, as Sgt. Champion pointed out, Sportswest was inadequately staffed to handle a crowd of 50-60 customers on a Friday night. With only two people to serve alcoholic beverages in addition to cleaning and cooking, it seems unlikely Ms. Eckhart or Ms. Haskins-Sulma were in a position to adequately monitor the alcohol consumption of the customers, even if such a system were in place. Respondent argued it is not uncommon for an establishment to be missing a bartender on a given night for various reasons such as illness. However, the evidence is void of any attempt Sportswest made to compensate for being understaffed such as hiring temporary staff to handle non-serving duties or having a list of back-up employees to call for just such an occasion.

Because there is no set formula for determining a violation under this statute, and because there are many ways a permit holder can violate this statute, the ALJ finds Staff’s argument persuasive in that the manner Sportswest conducted its business was in patent disregard of the general welfare and health of the people by not having a system in place to monitor or control the consumption of alcoholic beverages by its customers. Evidence of individuals consuming 12 or more beers without being cut off or admonished; and that of a customer drinking enough alcohol to have a 0.24 BAC clearly proves no system was in place and that Respondent violated this statute.

C. Did Respondent violate TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) and (2) by selling or delivering an alcoholic beverage to an obviously intoxicated person?

1. Testimony of Mr. Guevara and Mr. DeLeon

Mr. Guevara testified he did not observe J.R. staggering or displaying any signs of intoxication. Mr. Guevara also admitted that he could not tell if J.R. was slurring his speech at Sportswest, only that J.R. was loud and obnoxious, which is how he normally acted.

Mr. DeLeon testified he and J.R. had drunk beer together on several occasions and that looking at him objectively, “you probably could not tell he was intoxicated” because he was not “stumbling or fumbling” at Sportswest. Mr. DeLeon characterized J.R. as an “experienced drinker” and that any signs of intoxication he may have had were not “obvious to any observer.”

2. Testimony of James Burris

Mr. Burris works in the DPS crime lab toxicology section. He analyzed J.R.’s blood and found it had a 0.24 BAC. Mr. Burris has been doing blood-alcohol analysis for 30 years and is familiar with blood alcohol content and the effects of alcohol. Based on J.R.’s height and weight, Mr. Burris determined J.R. had consumed 9 - 10 beers before the accident.

However, Mr. Burris acknowledged that J.R. may not have presented any signs of intoxication while at Sportswest. He explained that although “a trained individual” is able to observe signs of intoxication, some people can mask certain things like unsteady balance and slurred speech when they are intoxicated. Mr. Burris asserted that if J.R. did nothing out of the ordinary like “stumble, fall down, make a big scene or whatever—nobody may have noticed his intoxication level.” Mr. Burris explained that he sometimes cannot determine if subjects in his toxicological classes are intoxicated (with a 0.14 BAC) until he gets in their face, talks to them, looks at their eyes, and listens to them speak for a period of time. He also agreed that it is possible for a reasonably prudent person not to recognize someone is at 0.24 BAC, and acknowledged that an experienced drinker can mask obvious signs of intoxication.

3. ALJ's analysis

J.R. showed no signs of being "obviously intoxicated" while at Sportswest. As an experienced drinker, J.R. was able to mask the signs of intoxication from the Sportswest staff and some of his co-workers. Mr. Guevara is the only co-worker who recognized J.R. had "too much" to drink and began taking steps to prevent further consumption by throwing away his beer bottles. However, even he admitted J.R. showed no outward signs of intoxication. Mr. Burris, Staff's own witness, admitted it was possible that a reasonably prudent person may not know that an individual has a 0.24 BAC.

V. CONCLUSION

Staff proved two of its three allegations against Respondent. Staff did not prove by a preponderance of the evidence that Respondent or its employees violated the Texas Alcoholic Beverage Code or TABC rules by serving an obviously intoxicated person on June 1, 2007. Staff proved that Respondent or its employees sold or delivered an alcoholic beverage to an intoxicated person. Staff also proved the place and manner in which Respondent conducts its business warrants the cancellation or suspension of its permit based on the general welfare, health, peace, morals and safety of the people and the public sense of decency, because on June 1, 2007, it failed to monitor or control the consumption of alcoholic beverages by its consumers. Under the applicable penalty considerations discussed above, the ALJ recommends Respondent's permit be suspended for 30 days for violating TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(14) and (7).

VI. FINDINGS OF FACT

1. Sportswest Family Center, Ltd. d/b/a Sportswest (Respondent or Sportswest) is the holder of a Mixed Beverage Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 308 Highway 46 South, Seguin, Guadalupe County, Texas.

2. On June 1, 2007 several employees of Cavco Industries, Inc. (Cavco) including Jose Roel Amaya (J.R.), Epi Guevarra, Jose DeLeon, Lauren Neumann, and Amber O'Brien went to Sportswest after work.
3. J.R. arrived at Sportswest at approximately 4:00 p.m.
4. While at Sportswest, the Cavco employees socialized and consumed alcoholic beverages.
5. The Cavco employees started out at a large table, moved to the pool tables and eventually ended up in an area that had bowling lanes.
6. J.R. became boisterous, obnoxious and loud at approximately 7:30 p.m. after consuming three shots of tequila.
7. J.R.'s co-worker, Epi Guevara, attempted to prevent J.R. from consuming more alcohol by telling Sportswest staff and a fellow co-worker that J.R. had enough to drink.
8. On three occasions, after Mr. Guevara threw away J.R.'s beer, J.R. had another beer in his hand.
9. Mr. Guevara gave up on his attempts to prevent J.R. from consuming more alcohol.
10. Joey DeLeon and J.R. drank 15 – 16 beers each while at Sportswest.
11. J.R. was intoxicated while at Sportswest.
12. J.R. was an "experienced drinker."
13. J.R. did not stumble, stagger, or start a fight while he was at Sportswest.
14. J.R. was able to mask certain characteristics of intoxication such as slurred speech and unsteady balance.
15. J.R. did not appear to be obviously intoxicated while at Sportswest.
16. At about 11:00 p.m., J.R. left Sportswest in his truck.
17. At approximately 11:30 p.m., J.R.'s truck veered into oncoming traffic on Highway 123 in Guadalupe County, Texas.
18. J.R.'s truck hit two vehicles. The first was an unoccupied vehicle being towed by another vehicle. The second vehicle contained six family members.
19. J.R. and the six family members all died in the accident.

20. After an investigation into the accident, it was determined that J.R.'s blood alcohol concentration (BAC) level was 0.24.
21. On June 1, 2007, Sportswest had no written policies on:
 - a. how to serve alcoholic beverages;
 - b. how to detect intoxicated patrons; or
 - c. how to monitor or control the amount of alcoholic beverages its customers consumed.
22. On June 1, 2007, Sportswest had only two employees working the bar and snack bar area.
23. In addition to serving drinks, the two employees would prepare food orders and clean off tables.
24. Sportswest was understaffed to handle a Friday night crowd of 50-60 people on June 1, 2007.
25. On June 3, 2008, TABC sent its Notice of Hearing to Respondent.
26. The Notice of Hearing 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 was convened on January 7, 2009, at the State Office of Administrative Hearings, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before Administrative Law Judge Steven M. Rivas. The Commission appeared through its staff attorney Emily Helm. Respondent appeared through its attorney Dewey Brackin. Evidence was presented, and the record closed May 13, 2009, after each party submitted written closing argument.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.61.
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; TEX. ALCO. BEV. CODE ANN. §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. Based on Findings of Fact Nos. 6-11 and 20, Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14) by selling or delivering an alcoholic beverage to an intoxicated person.
5. Based on Findings of Fact Nos. 20-24, Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7) by conducting its business in a manner that warrants cancellation or suspension of its permit based on the general welfare and safety of the people by failing to monitor or control the consumption of alcoholic beverages by its customers.
6. Based on Findings of Fact Nos. 12-15, Respondent did not violate TEX. ALCO. BEV. CODE ANN. § 2.02(b)(1) and (2) because it did not sell or deliver an alcoholic beverage to an obviously intoxicated person.
7. Based on Conclusions of Law Nos. 4 and 5, cancellation or suspension of Respondent's permit is warranted under TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and (14).
8. A 30-day suspension period falls within the time period that a permit may be suspended if a permittee violates a provision of the Code, as set out in TEX. ALCO. BEV. CODE ANN. § 11.62(b)(2).
9. Sportswest's permit should be suspended for 30 days.

SIGNED July 6, 2009.



**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**