

DOCKET NO. 592605

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
D.N.W. HOUSTON INC., D/B/A GOLD CUP, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. MB225277, LB & PE	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5662)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of July, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Stephen J. Burger presiding. The hearing convened on September 24, 2010 and the SOAH record closed October 6, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 12, 2010. 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, 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 motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that **NO ACTION** be taken by the Texas Alcoholic Beverage Commission in this matter against Mixed Beverage Permit No. 225277, and the Mixed Beverage Late Hours Permit and Beverage Cartage Permit associated therewith.

This Order will become final and enforceable on the 8th day of August, 2011, unless a Motion for Rehearing is filed **before** that date.

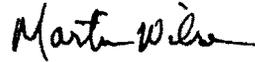
SIGNED this the 14th day of July, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 14th day of July, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Stephen J. Burger
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: 512.322.0474

D.N.W. Houston, Inc.
d/b/a Gold Cup
RESPONDENT
P.O. Box 570427
Houston, Texas 77257
VIA REGULAR MAIL

Albert T. Van Huff
Minshaugen & Van Huff, P.C.
ATTORNEY FOR RESPONDENT
1225 North Loop West, Suite 640
Houston, Texas 77008
VIA REGULAR MAIL
AND VIA FACSIMILE: 713.880.5297

Sandra Patton
ATTORNEY FOR PETITIONER
TABC Legal Division

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

November 12, 2010

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

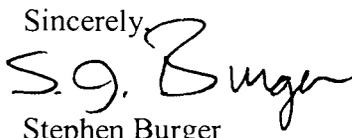
VIA REGULAR MAIL

**RE: Docket No. 458-10-5662; Texas Alcoholic Beverage Commission v. D.N.W.
Houston Inc. d/b/a Gold Cup**

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, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Stephen Burger
Administrative Law Judge

SB/rlm
Enclosure

cc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra Patton, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with exhibits and 1 cd)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Albert T. Van Huff, Monshaugen & Van Huff, P.C., 1225 North Loop West, Suite 640, Houston, Texas 77008- **VIA REGULAR MAIL**

RECEIVED

NOV 15 2010

2020 North Loop West Suite 111 Houston, Texas 77018
713.957.0010 (Telephone) 713.812.1001 (Fax)
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STATE OF TEXAS
HOUSTON
LEGAL

II. LEGAL STANDARDS AND APPLICABLE LAW

The commission or administrator may suspend or cancel a permit if the permittee, its agent, servant, or employee was intoxicated on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. §§ 1.04(11), 11.61(b)(2) and 11.61(b)(13). “Intoxicated” is defined as (A) not having the normal use of mental or physical faculties by the introduction of alcohol, or (B) having an alcohol concentration of 0.08 or more. TEX. PENAL CODE § 49.01(2).

III. DISCUSSION OF EVIDENCE AND ANALYSIS

A. Petitioner’s Case

Petitioner alleges that an employee for Respondent was intoxicated at Respondent’s establishment on February 4, 2010, and Petitioner requests a 25-day suspension of Respondent’s permit. Petitioner’s witnesses’ testimony is summarized below.

Michael Sehon is an agent with the TABC. He testified that on February 4, 2010, he and eight to ten Houston Police undercover officers entered Respondent’s establishment, which is a sexually oriented bar. Agent Sehon arrived at about 10:00 p.m., and shortly thereafter he observed a waitress, later identified as Dody Wood, leaning against a wall as if she needed support. Ms. Wood seated him and another officer, Officer Miller, and thereafter waited on other patrons. Agent Sehon noticed Ms. Wood “swayed” while she walked. When Ms. Wood took Agent Sehon’s drink order, he noticed that she lost her balance and nearly fell onto Officer Miller. Agent Sehon also noticed that Ms. Wood’s speech was slurred and she fumbled with money while making change.

Later in the evening, Ms. Wood was arrested for being intoxicated and given a citation. The citation was ultimately dismissed. Agent Sehon did not believe Ms. Wood was a danger to herself or others, nor did he see Ms. Wood fall or spill any drinks. To his knowledge, no field sobriety tests or breath tests were given to Ms. Wood.

B. Respondent's Case

Respondent contends that Ms. Wood was not intoxicated on the night in question. Ms. Wood testified that she had been a waitress for Respondent for about two-and-a-half years. She denied drinking alcohol that evening, and stated she had worked a day job before her evening job and was "dead tired," and that was why she was leaning against a pillar.

Ms. Wood also stated that on the night in question she was wearing five-inch heels and had previously lost her balance due to the high-heels. She did not deny she may have stumbled when she waited on the officers, but she did not believe she was swaying when she walked. Ms. Wood also claimed she always has candy in her mouth when she works at the club to prevent having bad breath when dealing with customers, and this could explain any reported slurred speech.

Finally, Ms. Wood admitted she does have difficulty making change due to the type of change purse she uses when working at the club. She was not given any field sobriety tests and was arrested at her car while she was leaving the club.

C. Analysis

Petitioner argues that Agent Sehon's observations of Ms. Wood provide sufficient evidence that she was intoxicated on the evening of February 4, 2010. He testified that Ms. Wood was: leaning against a wall for support, swaying as she walked, losing her balance when taking the drink order, slurring her speech, and having difficulty making change.

Ms. Wood testified that she did not have anything to drink, and attributed her leaning against a pillar as simply a result of being tired from working a job earlier that day. She attributed her poor balance to the five-inch heels she was wearing, and any alleged slurring of her speech due to the candy she had in her mouth.

Since there is no evidence of a blood or breath test, for the Petitioner to prevail it must show that on February 4, 2010, while Ms. Wood was working as a waitress at Respondent's club, Ms. Wood was intoxicated by not having the normal use of her mental or physical faculties by the introduction of alcohol. TEX. PENAL CODE § 49.01(2). After considering and weighing all the evidence the ALJ has determined that Agent Sehon's testimony regarding his observations of Ms. Wood on the night in question is outweighed by Ms. Wood's testimony explaining her activity that evening, including her credible testimony that she did not have anything to drink that night. Agent Sehon did not note the odor of an alcoholic beverage on Ms. Wood's breath. Additionally, the ALJ notes that no field sobriety tests were given to Ms. Wood.

Based on a review of all the evidence, the ALJ finds insufficient evidence proving that on the evening of February 4, 2010, Ms. Wood had lost the normal use of her mental or physical faculties by reason of consuming alcohol.

IV. RECOMMENDATION

The ALJ recommends that Petitioner not be allowed to suspend Respondent's permit.

V. FINDINGS OF FACT

1. D.N.W. Houston Inc., d/b/a Gold Cup (Respondent), is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit and a Beverage Cartage Permit, MB225277, PE & LB, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 12747 NW Freeway, Houston, Harris County, Texas.
2. A Notice of Hearing dated August 11, 2010, was issued by the TABC notifying Respondent of the time, date, and nature of the hearing; legal authority and jurisdiction under which the hearing would be held; applicable statutes and rules; and the matters asserted.

3. On September 24, 2010, a hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger in Houston, Texas. The Respondent appeared at the hearing and was represented by Albert Van Huff, attorney. The TABC was represented by Sandra Patton, attorney. The record was kept open for briefs from the parties, and closed on October 6, 2010.
4. On February 4, 2010, Dody Wood was working as a waitress at Respondent's premises.
5. On February 4, 2010, while working as a waitress at Respondent's premises, Dody Wood swayed while she walked, leaned against a wall, and fumbled with money while making change.
6. On February 4, 2010, Agent Sehon did not detect the odor of an alcoholic beverage on Dody Wood.
7. On February 4, 2010, Dody Wood wore five-inch heels, which affected her balance; chewed gum, which affected her speech; and had difficulty making change due to the type of change purse she used.
8. On February 4, 2010, Dody Wood did not consume any alcohol while working as a waitress at Respondent's bar.
9. On February 4, 2010, Dody Wood was not given field sobriety, breath or blood tests.

VI. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 5.31.
2. The State Office of Administrative Hearings (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 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. The parties received proper and timely notice of the hearing pursuant to the TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. There was insufficient evidence to prove that on February 4, 2010, Respondent or Respondent's agent, servant, or employee, was intoxicated on the permitted premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 11.61(b)(13).
5. Petitioner is not authorized to suspend Respondent's Mixed Beverage Permit, Mixed Beverage Late Hours Permit and Beverage Cartage Permit, MB225277, PE & LB, for the

premises located at 12747 NW Freeway, Houston, Harris County, Texas.

SIGNED November 12, 2010.

A handwritten signature in black ink, appearing to read "S. Burger", is written over a horizontal line.

STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE