

**DOCKET NO. 593132**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>VS.</b>	§	
	§	
<b>BOBBY ALVIN ALTMAN, SR. &amp; CYNTHIA JOYCE AUSTIN D/B/A WESTERN EDGE, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMIT NO. MB717898</b>	§	
	§	
<b>TAYLOR COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5844)</b>	§	<b>BEVERAGE COMMISSION</b>

**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 Monica Garza presiding. The hearing convened on October 12, 2010 and the SOAH record closed the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on November 16, 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.

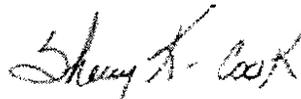
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporates those Findings 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. 717898.

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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.

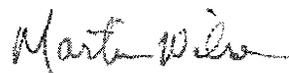


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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

### **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.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Monica Garza  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
6777 Cam Bowie Blvd, Suite 400  
Fort Worth, Texas 76116  
**VIA FACSIMILE: (512) 322-0473**

Bobby Alvin Altman, Sr. &  
Cynthia Joyce Austin  
d/b/a Western Edge  
**RESPONDENT**  
P.O. Box 5142  
Abilene, Texas 79608  
**VIA REGULAR MAIL**

David Thedford  
**ATTORNEY FOR RESPONDENT**  
P.O. Box 3122  
Abilene, Texas 79604  
**VIA REGULAR MAIL**  
**AND VIA FACSIMILE: (325) 673-1166**

John W. Sedberry  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division

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was represented at the hearing by John W. Sedberry, TABC Staff Attorney. David W. Thedford, Respondent's attorney, appeared for Respondent. Following presentation of evidence, the record closed on October 12, 2010.

**II. APPLICABLE LAW**

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(13), TABC may suspend for not more than 60 days or cancel a permit if it is found, after notice and hearing, that the licensee was intoxicated on the licensed premises. Further, TEX. ALCO. BEV. CODE ANN. § 104.01 provides as follows:

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 the 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-717898, issued by TABC, for the premises located at 1841 S. Treadaway, Abilene, Taylor County, Texas. This permit was issued on March 25, 2009.

**B. Respondent's Alleged Intoxication on the Licensed Premises**

On April 10, 2010, Cynthia Joyce Austin was the co-owner of Western Edge. On that date, Ms. Austin was on the licensed premises, visiting with a group of patrons. At approximately 12:20 a.m., TABC Agents Harold Salmon and Elias Arriaga entered the premises. The agents were investigating a

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complaint that Respondent was serving intoxicated patrons and selling alcoholic beverages during prohibited hours. As explained by Agent Salmon during his testimony, there are no "late hours" in Abilene; all alcoholic beverage consumption must end at 12:15 a.m. When the agents first entered the premises, they did not realize that Ms. Austin was present. However, after leaving a message for Ms. Austin with a waitress, Agent Salmon observed Ms. Austin with a group of patrons. He was familiar with Ms. Austin because he had met with her on previous occasions.

Agent Salmon made contact with Ms. Austin, and he observed that she displayed signs of possible intoxication. As described by Agent Salmon, Ms. Austin had the strong odor of an alcoholic beverage on her breath; had a "glassy, bewildered" look on her face; had slightly slurred speech; used slow, deliberate actions; and admitted consuming five beers (over an unknown time period). During his testimony, Agent Salmon opined that Ms. Austin appeared to act differently than she had during previous contacts.

After making these initial observations, Agent Salmon began an investigation to determine whether Ms. Austin was intoxicated. Ms. Austin performed two field sobriety evaluations at his request. Regarding the One Leg Stand evaluation, Agent Salmon described Ms. Austin swaying and counting incorrectly. Regarding the Walk and Turn evaluation, Agent Salmon described Ms. Austin failing to walk heel to toe and stepping off the line. Ms. Austin declined to provide a sample of her breath for the preliminary breath test. During his testimony, Agent Salmon acknowledged that his preliminary breath testing device had not been calibrated since it was issued to him.

Following his investigation, Agent Salmon concluded that Ms. Austin was intoxicated. She was placed under arrest for being an intoxicated permittee on the licensed premises. Western Edge received an administrative citation for Ms. Austin's intoxication on the licensed premises.

Portions of the investigation were captured on a video recording created by Agent Arriaga. The recording showed no notable issues with Ms. Austin's balance outside the realm of field sobriety testing. Ms. Austin's speech did not appear to be slurred on the recording. The recording also showed that Ms.

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Austin was able to engage in intelligent conversation with Agent Salmon. Regarding the field sobriety evaluations, Agent Salmon provided limited instructions for those evaluations, and he did interrupt Ms. Austin as she was attempting to perform those tasks. It was also apparent from the recording that Ms. Austin was not in peak physical condition (due to excessive weight) for the performance of tasks requiring good balance and coordination.

**C. Parties' Positions**

TABC supported Agent Salmon's conclusion that Ms. Austin was intoxicated on the licensed premises. TABC requested a 30-day suspension of Respondent's permit, or alternatively, a \$300 per day administrative penalty in lieu of suspension.

Respondent argued that Agent Salmon was incorrect in his conclusion that Ms. Austin was intoxicated. Respondent asked the ALJ to rely on the recording as the best evidence of Ms. Austin's appearance during the contact.

**IV. ANALYSIS**

The ALJ finds insufficient evidence to demonstrate that Ms. Austin, co-owner of Western Edge, was intoxicated on the licensed premises. Ms. Austin admittedly consumed five beers; however, it is unclear over what time period she consumed those alcoholic beverages. Agent Salmon described a "glassy, bewildered" look on Ms. Austin's face; however, such a look was not apparent from the recording. Agent Salmon described Ms. Austin's speech as slightly slurred. Again, the recording did not demonstrate any issues with Ms. Austin's speech. Regarding Ms. Austin's balance outside of the field sobriety testing, she did not appear to sway, stumble, or stagger on the recording. During the field sobriety testing portion of the investigation, Agent Salmon did not provide complete instructions for the One Leg Stand and Walk and Turn evaluations. Agent Salmon also interrupted Ms. Austin as she attempted portions of the field sobriety tasks. Further, based on her appearance on the recording, Ms.

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Austin was not the best candidate for tasks involving balance and coordination, due to physical factors having no relation to the consumption of alcoholic beverages. Taking those factors into consideration, Ms. Austin's performance on the field sobriety evaluations does not convince the ALJ that she was intoxicated. Finally, Ms. Austin's refusal to provide a sample of her breath for the non-calibrated preliminary breath testing instrument is not a sufficient indicator of intoxication.

Because Petitioner failed to prove Ms. Austin was intoxicated on the licensed premises, the ALJ finds that Respondent was not in violation of the code. The ALJ recommends that TABC take no action against Respondent's permit.

#### V. PROPOSED FINDINGS OF FACT

1. Bobby Alvin Altman, Sr. & Cynthia Joyce Austin d/b/a Western Edge (Respondent) holds a Mixed Beverage Permit, MB-717898, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 1841 S. Treadaway, Abilene, Taylor County, Texas.
2. This permit was issued on March 25, 2009.
3. On April 10, 2010, Cynthia Joyce Austin was the co-owner of Western Edge.
4. On that date, Ms. Austin was on the licensed premises, visiting with a group of patrons.
5. At approximately 12:20 a.m., TABC Agents Harold Salmon and Elias Arriaga entered the premises.
6. Agent Salmon made contact with Ms. Austin, and he observed that she displayed signs of possible intoxication.
7. Following an investigation, Agent Salmon concluded that Ms. Austin was intoxicated.
8. Ms. Austin was placed under arrest, and Western Edge received an administrative citation for Ms. Austin's intoxication on the licensed premises.
9. A video recording of the incident provided independent evidence of Ms. Austin's appearance.

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10. The video recording failed to demonstrate irregularities with Ms. Austin's speech, balance, or overall appearance.
11. Ms. Austin was not an ideal candidate for the One Leg Stand and Walk and Turn evaluations, due to her excessive weight.
12. Agent Salmon failed to give complete instructions for the One Leg Stand and Walk and Turn evaluations, and he interrupted Ms. Austin as she tried to perform those tasks.
13. TABC staff (Petitioner) failed to prove that Ms. Austin was intoxicated at the time of the contact.
14. On August 30, 2010, Petitioner issued its notice of hearing, directed to Respondent's attorney.
15. The notice contained a statement of the time, place, 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 matters asserted.
16. On October 12, 2010, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Monica Garza at the SOAH field office located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas.
17. Petitioner was represented at the hearing by John W. Sedberry, TABC Staff Attorney. Respondent appeared through its attorney, David W. Thedford.
18. Following presentation of evidence, the record closed on October 12, 2010.

## VI. PROPOSED CONCLUSIONS OF LAW

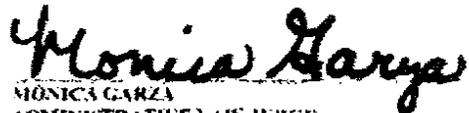
1. TABC has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 104.01.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.

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4. Petitioner failed to prove, by a preponderance of the evidence, that Ms. Austin was intoxicated on the licensed premises. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(13) and 104.01(5).
5. TABC should take no action against Respondent's permit.

SIGNED November 16, 2010.

  
MÓNICA GARZA  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS