

DOCKET NOS. 621296, 621297, 621298, 621299, 621300, & 623339

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
PGC I ENTERTAINMENT, INC. D/B/A DESIREE'S PREFERRED GENTLEMEN'S CLUB, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT MB717125, PE & LB	§	
	§	
	§	
TOM GREEN COUNTY, TEXAS (SOAH DOCKET NO. 458-14-2117)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 20th day of February, 2015, 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 Hunter Burkhalter presiding. The hearing convened on May 2, 2014 and the SOAH record closed on June 24, 2014. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on August 6, 2014. 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. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

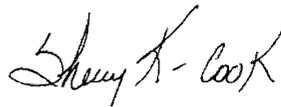
All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that the privileges granted by the Commission and the activities authorized under the above permits by the Code will be **SUSPENDED beginning at 12:01 a.m. on April 1st, 2015** and shall remain suspended for **SEVEN (7) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of **\$2,100.00** is paid **ON OR BEFORE March 24th, 2015**.

**This Order will become final and enforceable on the 17th day of March, 2015, unless a Motion for Rehearing is filed by the 16th day of March, 2015.**

**If a Motion for Rehearing is filed on time and is overruled**, the decision of the agency is final and appealable on the date the Order overruling the motion is issued or on the date the motion is overruled by operation of law.

**SIGNED** this the 20th day of February, 2015, at Austin, Texas.



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Sherry K-Cook, Executive Director  
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 20th day of February, 2015.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Hunter Burkhalter  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, TX 78701  
*VIA FACSIMILE: (512) 322-2061*

PGC I Entertainment, Inc.  
d/b/a Desiree's Preferred Gentlemen's Club  
**RESPONDENT**  
330 W. Washington Dr.  
San Angelo, TX 76903-6846  
*VIA FIRST CLASS MAIL, CMRRR # 70120470000133006473*

Timothy E. Griffith  
**ATTORNEY FOR RESPONDENT**  
101 E. Park Blvd., Suite 600  
Plano, TX 75074  
*VIA FIRST CLASS MAIL, CMRRR# 70120470000133006480*

Judith Kennison  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division  
*VIA E-MAIL: [Judith.kennison@tabc.texas.gov](mailto:Judith.kennison@tabc.texas.gov)*

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 621296, 621297, 621298, 621299, 621300, 623339  
REGISTER NUMBER:

NAME: PGC I Entertainment Inc.

TRADENAME: Desiree's Preferred Gentlemen's Club

ADDRESS: 330 W. Washington Drive, San Angelo, Texas

DUE DATE: March 24, 2015

PERMITS OR LICENSES: MB717125, PE, LB

AMOUNT OF PENALTY: \$2,100.00

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_  
You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
P.O. Box 13127  
Austin, Texas 78711  
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address P.O. Box No.

\_\_\_\_\_  
City State Zip Code

Area Code/Telephone No.

**SOAH DOCKET NO. 458-14-2117**  
**(TABC CASE NOS. 621296, 621297, 621298, 621299, 621300, & 623339)**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION,</b>	<b>§</b>	
<b>Petitioner</b>	<b>§</b>	
 	<b>§</b>	
<b>v.</b>	<b>§</b>	<b>OF</b>
 	<b>§</b>	
<b>PGC I ENTERTAINMENT, INC.</b>	<b>§</b>	
<b>D/B/A DESIREE'S PREFERRED</b>	<b>§</b>	
<b>GENTLEMENS CLUB,</b>	<b>§</b>	
<b>(Permit No. MB727215, PE &amp; LB)</b>	<b>§</b>	
<b>Respondent</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff (Staff) of the Texas Alcoholic Beverage Commission (Commission) seeks cancellation of the alcoholic beverage permits held by PGC I Entertainment, Inc. d/b/a Desiree's Preferred Gentlemens Club (Respondent) based on Respondent's alleged violations of the Commission's rules. Based on the evidence, the Administrative Law Judge (ALJ) concludes that the Commission has proved some, but not all, of its claims, and recommends that Respondent's permits be suspended for 7 days, or that Respondent pay a penalty of \$2,100 in lieu of the suspension.

**I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION**

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits was held on May 2, 2014, at 124 W. Beauregard Avenue in San Angelo, Texas. Staff attorney Judith L. Kennison represented Staff, and attorney Timothy E. Griffith represented Respondent. The record closed on June 24, 2014, with the filing of the final brief from the parties.

On September 20, 2012, the Commission's administrator signed two Waiver Orders that resolved pending disciplinary cases against Respondent. In both Waiver Orders, Respondent waived its right to a hearing on the allegations. The first Waiver Order (2012 Waiver Order No. 1) resolves the Commission's allegation that Respondent committed a "place or manner" violation on June 30, 2012. In that order, the administrator found that Respondent had committed the violation and suspended Respondent's permits for 5 days (beginning on October 31, 2012) with the option for Respondent to pay a \$1,500 penalty in lieu of the suspension.<sup>3</sup>

Confusingly, the second Waiver Order (2012 Waiver Order No. 2) purports to resolve the same Commission allegation that was addressed in 2012 Waiver Order No. 1 (i.e., that Respondent committed a "place or manner" violation on June 30, 2012). In 2012 Waiver Order No. 2, the administrator found that Respondent had committed the violation and suspended Respondent's permits for 10 days (again, beginning on October 31, 2012) with the option for Respondent to pay a \$3,000 penalty in lieu of the suspension.<sup>4</sup>

On February 3, 2013, a fight broke out in Respondent's premises. The Commission has, in a prior contested, adjudicative hearing, already made factual findings concerning the fight. Those findings are summarized as follows. The fight involved two men. As the fight progressed, patrons of the bar and bar employees intervened in an attempt to bring the fight to a close. During the fight, the two men and the group of those surrounding them ranged over a significant area of the strip club, upending tables and chairs and knocking over a disabled woman in the process. During the fight, three people were assaulted, including the disabled woman and a strip club employee. Three strip club employees intervened in the fight, restrained patrons, and removed one of the fight participants from the scene. None of these three employees was licensed to work as a security officer by the DPS. No DPS-licensed security officers were on the premises at the time of the fight. If a licensed security officer had been on the premises, he could have handcuffed the two men and restrained them before their argument had escalated into a

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<sup>3</sup> Staff Ex. 2 at 4-5.

<sup>4</sup> Staff Ex. 2 at 6-7.

Code §§ 11.61(b)(7), 61.71(a)(17), and 16 Texas Administrative Code § 35.31(b); and

- On or about February [3], 2013, Respondent . . . conducted the Respondent's business in a manner contrary to the general welfare, health, peace, morals and safety of the people and on the public sense of decency in violation of Texas Alcoholic Beverage Code §§ 11.61(b)(7) or 61.71(a)(17), to wit: violations of Texas Occupations Code §§ 1702.3875, 1702.102, 1702.108, 1702.221, 1702.222, and 1702.386.<sup>8</sup>

As to the incident on December 13, 2013, Staff alleges that an employee of Respondent exposed her vagina to an undercover Commission agent who was posing as a patron at the strip club, in violation of Texas Alcoholic Beverage Code §§ 104.01(2) and 11.61(b)(2).

## **B. Applicable Law**

The Commission or administrator may suspend for up to 60 days or cancel a permit if:

- the permittee is found to have violated a provision of the Alcoholic Beverage Code or a rule of the commission; or
- the place or manner in which the permittee conducts its business warrants the cancellation or suspension "based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency."<sup>9</sup>

The Alcoholic Beverage Code prohibits lewd, immoral, and indecent conduct as follows, in relevant part:

Sec. 104.01. LEWD, IMMORAL, INDECENT CONDUCT. 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

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<sup>8</sup> In its First Amended Notice of Hearing, Staff lists five "docket numbers" arising from the February 3, 2013 incident. The docket numbers used are not SOAH docket numbers. As best the ALJ can discern, by breaking out the allegations into five docket numbers, Staff appears to be alleging that Respondent's actions on February 3, 2013 constituted five separate violations. However, because the text accompanying four of the docket numbers is identical, the ALJ can identify only two alleged violations arising from the February 3, 2013 incident.

<sup>9</sup> Tex. Alc. Bev. Code § 11.61(b)(2), (7).

Jason Graham work has worked for roughly 12 years at DPS as a law enforcement agent. He is stationed in Abilene, Texas. He explained that DPS licenses security officers in Texas. According to Agent Graham, following the February 3, 2013 incident, DPS initiated an enforcement action against Respondent for hiring and using three employees as security guards when they were not licensed as such, in violation of DPS rules. The DPS enforcement action is still pending. Agent Graham testified that Respondent employed security guards who were required to hold DPS-issued licenses, while knowing that they did not, in fact, hold DPS-issued licenses. According to Agent Graham, this constitutes a violation of Texas Occupations Code § 1702.386. Agent Graham further testified that the three strip club employees seen on the video of the fight were illegally working as security guards at the club on the night of the fight, in violation of requirements in Chapter 1702 of the Texas Occupations Code.

**b. Analysis**

Staff contends that, by its actions on February 3, 2013, Respondent: (1) violated Texas Occupations Code §§ 1702.3875, 1702.102, 1702.108, 1702.221, 1702.222, and 1702.386 (which are rules enforced by DPS and which generally require that anyone wishing to work as a security guard must first be licensed by the DPS); and (2) by so doing, violated Texas Alcoholic Beverage Code § 11.61(b)(7) (which empowers the Commission to suspend or cancel a permit if the establishment is operated in a place or manner that jeopardizes the public welfare, health, safety, or the sense of decency).

Respondent argues that this claim is barred by res judicata because the February 3, 2013 incident has already been litigated. The ALJ agrees. The doctrine of res judicata prevents the re-litigation of claims that have already been adjudicated, “as well as related matters that, with the use of diligence, should have been litigated in the prior suit.”<sup>10</sup> The Texas Supreme Court has explained that res judicata is needed in order “to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double

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<sup>10</sup> *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992).

## 2. The December 13, 2013 Exposure Incident

### a. Evidence

Ricardo Balli has worked for the Commission as an undercover agent for roughly six years. He is assigned to the San Angelo area. He testified that, on December 13, 2013, he and another Commission agent, Agent Simcik, entered Respondent's strip club posing as customers as part of an undercover operation. Agent Balli testified that he was approached by a dancer. The dancer, who was later identified as Shawna Mary Shipley, was wearing a thong bikini and bikini top. Earlier in the evening, Agent Balli had seen Ms. Shipley stripping on the main stage of the club. Ms. Shipley told Agent Balli that, for \$25, she would perform a "lap dance" for him. When Agent Balli agreed, Ms. Shipley led him to an area of the facility that is partially cordoned off from the remainder of the club. He described it as the "VIP" or lap dance section. According to Agent Balli, the VIP section has low walls of about four feet that separate it from the remainder of the club, which is more open. He explained that patrons in the more open area of the club can easily see what is occurring in the VIP section by simply looking over the low partition walls.

During the lap dance, Ms. Shipley removed her top. She also stood in front of Agent Balli and bent over, such that she was facing away from him. She then reached down to her crotch and pulled the thong to the side, leaving her vagina exposed and visible to Agent Balli for 10 to 15 seconds. Agent Balli testified that she did this two or three times during the dance. According to Agent Balli, there was a male employee of the strip club in the VIP section throughout the lap dance. This employee was standing at the entrance to the VIP section, roughly 10 to 15 feet from Agent Balli, and he had a notepad, on which he was writing down the names and times of dancers entering and leaving the VIP section. Agent Balli does not know whether the male employee or anyone else in the building saw Ms. Shipley expose herself.

Agent Balli offered his opinion that Ms. Shipley's actions constituted a violation of Texas Alcoholic Beverage Code § 104.01. He testified that his opinion would not change if

These Rules are made for your wealth, safety and to keep you out of jail.<sup>14</sup>

It appears that the copy of the rules provided by Ms. Gaona was, on July 30, 2010, reviewed and signed by Shawna Shipley, the dancer who is alleged to have exposed herself to Agent Balli.<sup>15</sup> Ms. Gaona testified that she enforces these rules. She testified that she was unaware Ms. Shipley had exposed herself to Agent Balli. When she became aware, she suspended Ms. Shipley for 30 days. According to Ms. Gaona, the Tom Green County district attorney (DA) was made aware of Ms. Shipley's actions on December 13, 2013. Ultimately, however, the DA decided not to criminally prosecute Ms. Shipley for her actions. Ms. Gaona testified that, since she assumed ownership in 2009, the compliance history of the club has improved.

**b. Analysis**

The evidence clearly establishes that Ms. Shipley exposed her vagina to Agent Balli. Agent Balli testified credibly at the hearing. Ms. Shipley did not testify, nor did any other witness dispute Agent Balli's testimony. The preponderance of the evidence also establishes that Respondent permitted Ms. Shipley to expose herself, in violation of Texas Alcoholic Beverage Code § 104.01(2). It is true that Respondent has adopted rules which purport to prohibit dancers from exposing themselves. Yet, the evidence indicates that those rules are not actively enforced. The club has had a number of exposure cases over the years. Moreover, a male employer of the club stood nearby while Ms. Shipley exposed herself to Agent Balli. That employee was concerned enough to make notes as to when dancers entered and exited the VIP area but did not appear to have been concerned with the dancers' conduct within the VIP area. The conclusion that Respondent knowingly permitted Ms. Shipley to expose herself is buttressed by the fact that, in its closing briefing, Respondent does not argue otherwise. Rather, Respondent makes a number of other arguments, none of which is convincing.

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<sup>14</sup> Respondent Ex. 8.

<sup>15</sup> Respondent Ex. 8.

determine the appropriate sanction. By statute, the Commission may suspend (for up to 60 days) or cancel a permit for a violation.<sup>16</sup> For a violation of this type, however, the Commission *must* give Respondent the option to pay a civil penalty in lieu of any suspension, and the penalty can range between \$150 and \$25,000.<sup>17</sup>

Staff argued that Respondent's prior enforcement history, which is admittedly quite poor, justifies an enhancement of the sanctions to be imposed. The evidence and the Commission's rules, however, indicate otherwise. The rules mandate that a "subsequent violation of the Code or rule will result in a sanction in the next higher violation level" provided, however, that a subsequent violation such as exposure is committed within 36 months of the prior exposure violation.<sup>18</sup> Agent Balli testified that the concept of increasing sanctions based upon prior violations is specific to the type of violation involved. Thus, only prior exposure violations can be used to enhance the penalty assessed for an exposure violation. Further, per the Commission rule cited above, only exposure violations occurring within 36 months prior to December 13, 2013, can be used to enhance the penalty assessed for the exposure violation in this case. The Commission offered no testimony or other evidence to counter Agent Balli's testimony on this point. Moreover, the text of the Commission's rules seems to be consistent with Agent Balli's testimony. Pursuant to the rules:

- a first violation of Texas Alcoholic Beverage Code § 104.01(2) warrants a suspension of between 5 and 7 days or a fine of \$300 per day for the same period of time;
- a second violation of Texas Alcoholic Beverage Code § 104.01(2) warrants a suspension of between 10 and 14 days or a fine of \$300 per day for the same period of time; and

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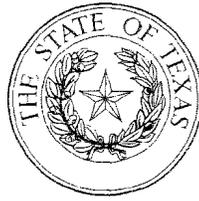
<sup>16</sup> Tex. Alc. Bev. Code § 11.61(b)(2).

<sup>17</sup> Tex. Alc. Bev. Code § 11.64(a).

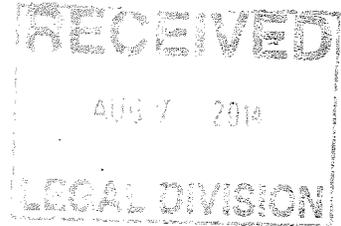
<sup>18</sup> 16 Tex. Admin. Code § 34.1(g)(1).

6. Respondent has an extensive number of prior violations, including two prior exposure violations. Neither of the prior exposure violations occurred within 36 months prior to the exposure violation at issue in this case.
7. On February 3, 2013, a fight broke out in Respondent's premises. During the fight, three people were assaulted. Three of Respondent's employees intervened in the fight. Respondent did not have licensed security officers on the premises at the time of the fight.
8. In April 2013, Staff initiated an enforcement action against Respondent alleging a number of violations stemming from the February 3, 2013 fight. Primarily, Staff alleged violations having to do with the fact that Respondent did not have on the premises security guards licensed by the Texas Department of Public Safety (DPS). A contested case hearing was held before the State Office of Administrative Hearings (SOAH). In that proceeding (SOAH Docket No. 458-13-2211) the Commission ultimately found that Respondent's actions on February 3, 2013, constituted various violations of its rules and ordered that Respondent's permits be suspended for 60 days or that Respondent pay an \$18,000 fine in lieu of suspension.
9. In the present proceeding, Staff contends that Respondent violated various statutes by failing to have DPS-licensed security guards on the premises during the February 3, 2013 fight.
10. Staff's claims raised in this proceeding regarding the February 3, 2013 fight could and should have been raised in SOAH Docket No. 458-13-2211.
11. Staff's claims raised in this proceeding regarding the February 3, 2013 fight stem from the same transaction that was at issue in SOAH Docket No. 458-13-2211, and both cases involve the same facts, parties, time, origin, and motivation. Moreover, the allegations raised in the present case would have formed a convenient trial unit with SOAH Docket No. 458-13-2211.
12. On December 13, 2013, Ricardo Balli, an undercover agent employed by the Commission, entered Respondent's strip club posing as a customer.
13. For \$25, a stripper employed at the club, Shawna Mary Shipley, offered to perform a lap dance for Agent Balli.
14. When Agent Balli agreed, Ms. Shipley led him to the "VIP" section of the club, an area that is only partially cordoned off from the remainder of the club.
15. On at least two occasions during the lap dance, Ms. Shipley reached down to her crotch and pulled her thong to the side, leaving her vagina exposed and visible to Agent Balli for 10 to 15 seconds.

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge



August 6, 2014

Sherry Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA INTERAGENCY MAIL

**RE: SOAH Docket No. 458-14-2117; Texas Alcoholic Beverage Commission v. PGC I Entertainment, Inc. d/b/a Desiree's Preferred Gentlemens Club (Permit No. MB727215, PE & LB)**

Dear Ms. Cook:

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](http://www.soah.state.tx.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Hunter Burkhalter".

Hunter Burkhalter  
Administrative Law Judge

HB/mle  
Enclosure

xc Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 – VIA INTERAGENCY MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 – VIA INTERAGENCY MAIL (with 1 Hearing CD)  
Timothy E. Griffith, Griffith & Rich, PLLC, 101 E. Park Blvd., Ste. 600, Plano, TX 75074 – VIA REGULAR MAIL