

DOCKET NO. 458-03-2445

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

BEFORE THE STATE OFFICE

V.

OF

ANTONIO CHARLES
D/B/A EL TORMENTO NIGHT CLUB
DALLAS COUNTY, TEXAS
(TABC CASE NO. 603014)

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ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against Antonio Charles d/b/a El Tormento Night Club (Respondent), alleging that on or about November 24, 2002, Respondent, its agent, servant, or employee, consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours. Staff requested that Respondent's Beer Retailer's On-Premise License, BE-443854, and Retail Dealer's On-Premise Late Hours License, BL-443855, be suspended for seven days or that Respondent be ordered to pay a civil penalty of \$1,050 in lieu of suspension. The Administrative Law Judge (ALJ) finds that Respondent or its employees permitted others to consume alcoholic beverages on the licensed premises during prohibited hours, and therefore recommends that Staff's request be granted and that Respondent's licenses be suspended for seven days, or that Respondent be ordered to pay a civil penalty of \$1,050 in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On April 10, 2003, a hearing was held before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by its attorney Timothy Griffith. Respondent appeared *pro se*. The record was closed on that date.

II. LEGAL STANDARD AND APPLICABLE LAW

The Texas Alcoholic Beverage Commission (Commission) is authorized to suspend Respondent's original or renewal retail dealer's on-premise license for not more than 60 days if Respondent conducted his business in a manner which warrants the suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO.



BEV. CODE ANN. § 61.71(a)(17).

All provisions of the Texas Alcoholic Beverage Code (Code) which apply to a retail dealer's on-premise license also apply to a retail dealer's on-premise late hours license. TEX. ALCO. BEV. CODE ANN. § 70.03.

In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a.m. and 12 noon. TEX. ALCO. BEV. CODE ANN. § 105.06(c).

II. EVIDENCE

1. Staff's Evidence and Contentions

a. Chris Hamilton

Chris Hamilton, a Commission Sergeant, testified that on Sunday, November 24, 2002, at approximately 2:35 a.m., he and Agent Anthony Keel were in Respondent's establishment. He observed a named patron drinking what appeared to be beer from a plastic cup. When asked, the patron told Sgt. Hamilton that he was drinking Coors Light beer.

b. Anthony Keel

Anthony Keel, a Commission Agent, testified that he was with Sergeant Hamilton in Respondent's establishment on that date and observed customers drinking what appeared to be beer from plastic cups at approximately 2:35 a.m. Respondent's bartender told Agent Keel that the customers were not drinking beer, but were drinking Old Milwaukee non-alcoholic beer. However, Agent Keel was unable to find any open or empty Old Milwaukee non-alcoholic beer cans in either Respondent's establishment or in Respondent's dumpster.

Agent Keel further testified that pursuant to the Code, all sales of alcoholic beverages at Respondent's establishment must stop at 2:00 a.m., and all consumption of alcoholic beverages on the licensed premises must cease at 2:15 a.m. He testified that other licensees meet this requirement by physically picking up all remaining containers of alcohol from their patrons at 2:15 a.m.

He also testified that he observed an employee of Respondent's establishment standing behind the bar with a Bud Light beer bottle in her hand at approximately 2:35 a.m.

2. Respondent's Evidence and Contentions

a. Antonio Charles

Antonio Charles testified that it is the custom at Respondent's establishment to give plastic cups to the patrons at five minutes before 2:00 a.m., so the patrons can transfer their drinks from

bottles to cups. No sales of alcoholic beverages are made after 2:00 a.m. However, no attempt is made by Respondent's employees to take the cups away from the patrons after 2:15 a.m. He testified he cannot take beer away from patrons who have already paid for it.

b. Josefina Charles

Josefina Charles, an employee of Respondent's establishment, testified that on November 24, 2002, no sales of alcoholic beverages were made by Respondent's employees after 2:00 a.m.

IV. ANALYSIS

Staff presented credible evidence on the record that Respondent allowed patrons to consume or possess with intent to consume alcoholic beverages in Respondent's establishment, a public place, on Sunday, November 24, 2002, after 2:15 a.m. Respondent presented no evidence disputing Staff's allegation.

Although Respondent did present evidence showing that alcoholic beverages were not sold after 2:00 a.m. on that date, Respondent presented no evidence rebutting Staff's evidence that Respondent allowed patrons to continue consuming alcoholic beverages, or possess alcoholic beverages with the intent to consume them, after 2:15 a.m. In fact, Antonio Charles testified that the custom in Respondent's establishment is to allow patrons to continue consuming alcoholic beverages because he is of the opinion that he cannot take beer away from patrons who have already paid for it.

Staff further alleged that Respondent, its agent, servant, or employee, consumed an alcoholic beverage on the licensed premises during prohibited hours. Agent Keel testified, and the Texas Alcoholic Beverage Commission -- Dallas Incident Report (TABC Ex. No. 5) states, that an employee of Respondent's establishment was seen standing behind the bar at approximately 2:38 a.m. with a bottle of Bud Light beer in her hand. However, the evidence does not show that the employee was observed consuming any alcoholic beverages after 2:15 a.m., or that the employee intended to consume any alcoholic beverages after 2:15 a.m.

The evidence shows, by a preponderance of the evidence, that Respondent knew, permitted, and facilitated the consumption of alcoholic beverages by patrons after 2:15 a.m. on Respondent's licensed premises in violation of TEX. ALCO. BEV. CODE ANN. § 105.06(c). By knowingly enabling patrons to violate this Code provision, Respondent has conducted its business in a manner warranting the suspension of Respondent's licenses based on the general welfare, health, peace, morals, safety, and sense of decency of the people.

V. RECOMMENDATION

The ALJ recommends that Staff's request be granted and that Respondent's licenses be suspended for seven days or that Respondent be ordered to pay a civil penalty of \$1,050 in lieu of suspension.

FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, Antonio Charles d/b/a El Tormento Night Club, 3211 Northwest Highway, Dallas, Dallas County, Texas, holds Beer Retailer's On-Premise License, BE-443854, and Retail Dealer's On-Premise Late Hours License, BL-443855, issued by the Commission on December 28, 1998.
3. On Sunday, November 24, 2002, at 2:35 a.m., patrons at Respondent's licensed premise, a public place, were consuming, and possessing with intent to consume, alcoholic beverages.
4. On that date, Respondent's employees knew and permitted patrons of Respondent's licensed premise to consume, and possess with intent to consume, alcoholic beverages in an extended hours area after 2:15 a.m.
5. The Commission instituted disciplinary action against Respondent, alleging that Respondent, its agent, servant, or employees, permitted others to consume alcoholic beverages on the licensed premises during prohibited hours.
6. On April 10, 2003, a hearing was held at the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by its attorney Timothy Griffith. Respondent appeared *pro se*. The record was closed on that date.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, § 6.01. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021.
2. Based on Finding of Fact No. 3, Respondent's patrons committed the offense of consuming, or possessing with intent to consume, alcoholic beverages in a public place on a Sunday, between 2:15 a.m. and 12 noon, in an extended hours area. TEX. ALCO. BEV. CODE ANN. § 105.06(c).
3. Based on Finding of Fact Nos. 3 and 4 and Conclusion of Law No. 2, Respondent, by knowingly permitting patrons to violate TEX. ALCO. BEV. CODE ANN. § 105.06(c) on its licensed premises, conducted its business in a manner which warrants the suspension of Respondent's retail dealer's on-premise license based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO. BEV. CODE ANN. §

61.71(a)(17).

4. Based on Conclusion of Law Nos. 3, Respondent's retail dealer's on-premise late hours license is also subject to suspension. TEX. ALCO. BEV. CODE ANN. § 70.03.
5. Based on the foregoing findings and conclusions, the Commission is warranted in suspending Respondent's licenses for seven days or in ordering that Respondent pay a civil penalty of \$1,050 in lieu of suspension

SIGNED this 2 day of May, 2003.



JERRY VAN HAMME
Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 603014

IN RE ANTONIO CHARLES	§	BEFORE THE
D/B/A EL TORMENTO NIGHT CLUB	§	
LICENSE NOS. BE443854, BL443855	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2445)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of May 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on April 10, 2003, and adjourned on April 10, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 2, 2003. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which 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 Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that License Nos. BE443854 and BL443855 are hereby **SUSPENDED** for seven (7) days.

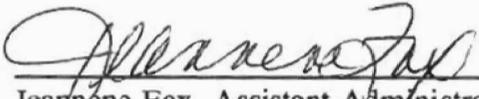
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **9th day of July, 2003**, all rights and privileges under the above described licenses will be **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M. on the 16th day of July, 2003**.

This Order will become final and enforceable on **June 13, 2003**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 27th day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

ANTONIO CHARLES
D/B/A EL TORMENTO NIGHT CLUB
RESPONDENT
3211 NW Hwy
Dallas, TX 75220-5944
CERTIFIED MAIL NO. 7001 2510 0003 8688 8265

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 603014 REGISTER NUMBER:

NAME: ANTONIO CHARLES TRADENAME: EL TORMENTO NIGHT CLUB

ADDRESS: 3211 NW Hwy., Dallas, Dallas County, Texas 75220-5944

DATE DUE: July 9th, 2003

PERMITS OR LICENSES: BE443854, BL443855

AMOUNT OF PENALTY: \$1,050.00

Amount remitted \$ _____ Date remitted _____

If you wish to a pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 9TH DAY OF JULY 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711**

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.