

DOCKET NO. 577378

IN RE NORMAN L. JETTY, JR.	§	BEFORE THE
D/B/A SHERWOODS BEER GARDEN	§	
PERMIT NO. BG-279176	§	
	§	TEXAS ALCOHOLIC
	§	-
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0931)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 18th day of November 1999, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on September 8, 1999 and adjourned September 8, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 20, 1999. This 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, 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 Permit No. BG-279176 is herein **SUSPENDED** for fifteen (15) days beginning on February 24, 2000, unless a penalty of \$4,500.00 is paid by February 17, 2000.

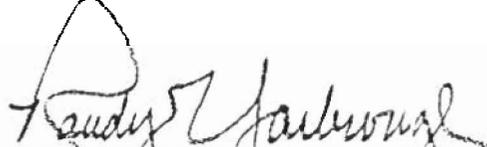
This Order will become final and enforceable on December 7, 1999, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 18th day of November, 1999.

On Behalf of the Administrator,




Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Don Smith
Administrative Law Judge
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE (713) 812-1001

Shanee Woodbridge, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Wesley Clements
ATTORNEY FOR RESPONDENT
1305 Prairie
Houston, Texas 77002
CERTIFIED MAIL/RRR NO. Z 473 038672

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 577378

REGISTER NUMBER:

NAME: NORMAN L. JETTY, JR.

TRADENAME: SHERWOODS BEER GARDEN

ADDRESS: 2830 S. Shaver, South Houston, Texas 77586

DATE DUE: February 17, 2000

PERMITS OR LICENSES: BG-279176

AMOUNT OF PENALTY: \$4,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to 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 18TH DAY OF FEBRUARY 2000, 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.

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 20, 1999

Doyme Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

CERTIFIED MAIL P 622 053 373
Return Receipt Requested

RE:Docket No. 458-99-0931; Texas Alcoholic Beverage Commission vs. Norman Lee Jetty, Jr. d/b/a Sherwoods Beer Garden (Sherwoods)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Gayle Gordon Assistant Attorney General, and to Wesley Clements, attorney for Respondent. For reasons discussed in the proposal, I have recommended a suspension of Respondent's permit for a period of fifteen (15) days or, in the alternative, an administrative penalty of \$4,500.00 be assessed against Respondent.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Board according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in cursive script that reads "Don Smith".

Don Smith
Administrative Law Judge

DS:rfm

Enclosures

cc: Gayle Gordon, Assistant Attorney General, 5806 Mesa Drive, Suite 160, Austin, Texas 78731 - ✓

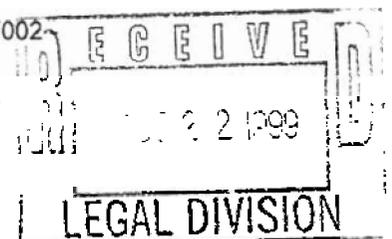
REGULAR MAIL

Wesley Clements, Attorney at Law, 1305 Prairie, Suite 300, Houston, Texas 77002

CERTIFIED MAIL RETURN RECEIPT REQUESTED P 622 053 372

Shanee Woodbridge, State Office of Administrative Hearing - **REGULAR MAIL**

North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001



DOCKET NO. 458-99-0931

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
VS. § OF
§
NORMAN LEE JETTY, JR. d/b/a §
SHERWOODS BEER GARDEN § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC or Staff) brought this disciplinary action against Norman Lee Jetty Jr. d/b/a Sherwoods Beer Garden (Sherwoods), a drinking establishment in Harris County, Texas. Staff alleged Sherwoods committed three violations of the Texas Alcoholic Beverage Code (Code).

A hearing in this case was held before Don Smith, Administrative Law Judge, on September 8, 1999, at the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. Staff appeared and was represented by Mr. Dewey Brackin. Sherwoods appeared and was represented by Mr. Wesley Clements.

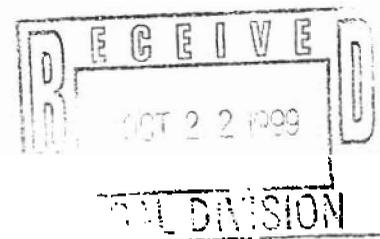
During the announcements, Sherwoods made two oral motions. The first oral motion was that the violations should not be consolidated into one hearing, but that each violation should be heard separately. The motion was denied. The second oral motion was a Motion to Dismiss alleging that TABC had not timely pursued the violations, thereby prejudicing the Respondent's ability to present witnesses. The motion was denied.

After announcements, the Staff informed the court that its witnesses to prove the November 22, 1997 allegation had failed to show at the hearing, and orally requested that the November 22, 1997 violation be dismissed with prejudice. The Court granted the Motion.

II. EVIDENCE PRESENTED

At the hearing, Staff and Sherwoods offered into evidence the following exhibits:

Staff Exhibit # 1: Inquiry by Citation report.
Sherwoods Exhibit # 1: Norman Jetty Sr. written testimony
Sherwoods Exhibit # 2: Norman Jetty Sr. notes
Sherwoods Exhibit # 3: Letter to TABC and TABC response letter



It was made known to the Court and Staff that Norman Jetty Sr. had previously had a throat operation whereby his speech was limited. Therefore, Sherwoods' attorney requested the Court admit Mr. Jetty's testimony in written form. Staff was allowed cross examination of Norman Jetty Sr., and the Court announced that no hearsay statements within the written testimony would be considered. All the exhibits were admitted into evidence.

The Staff called Gilbert Alba, a law enforcement officer with the Commission, as its only witness. Sherwoods called its attorney, Wesley Clements, and Norman Jetty, Sr., as witnesses.

1. Officer Gilbert Alba.

Officer Gilbert Alba is an agent with TABC. He testified that Sherwoods Beer Garden is an Ice House in Harris County, Texas selling beer under Permit BG 279176. A complaint had been received that Sherwoods was selling beer early on Sunday mornings in violation of Section 105.05 of the Code. Section 105.05 (b) allows the sale of beer on Sunday "between 10:00 a.m. and noon if the beer is served to a customer during the service of food to the customer." On Sunday morning, before 10:45 a.m. on April 26, 1998, Officer Alba and his partner, Chris Hamilton went to Sherwoods. They were undercover, dressed in blue jeans, boots, and regular shirts. He did not see any food being served at Sherwoods. At about 10:45 a.m., he went up to the bar and ordered two beers. The bartender, Ms. Bizena served him two Bud Lights. He paid her \$3.00 for the beer. When he ask her about the food, she stated that food was to be served. She said a brisket was being cooked out back on the bar-b-que grill. The manager, Norman Jetty, Sr. was present in the Ice House. Mr. Jetty Sr. was in a nook area close to the bar. Officer Alba observed around ten persons consuming beer in bottles or in cans at the Ice House, and in Ms. Bizena and Mr. Jetty's presence. No one was eating and no food was being served. He and his partner went back to their vehicle, put on their TABC jackets, and went back into the Ice House issuing citations to the patrons drinking beer after hours, arrested Ms. Bizena for serving after hours, and informed Mr. Jetty that because of his bad health, they were going to have a "to be warrant" issued to him, instead of arresting him at that time. Officer Alba testified that he never went to look to see if a brisket was on the grill. He did believe a brisket was on the grill, because several persons were drinking beer around the grill.

On cross-examination, Officer Alba testified that he issued at least six citations for consuming alcohol during prohibited hours, and that Ms. Bizena was charged with a Class B misdemeanor for serving alcohol during prohibited hours. His TABC "Inquiry by Citation" record showed six convictions and fines paid. He admitted that the "Inquiry by Citation" would not show whether or not the persons pled guilty or were found guilty. He testified that only the Court records would show the true dispositions of the cases.

It was his opinion, that in order to avoid being in violation of Section 105.05 (b) of the Code, there must be a buffet available, or be a purchase of food with the beer purchase. If a patron consumes beer before there is a food purchase, he will write a citation. He saw a lot of beer bottles at Sherwoods, but he did not see any food.

2. Attorney Wesley Clements

Wesley Clements is Sherwoods' attorney. He testified that he represented all the persons given citations and/or arrested from the April 26, 1998 incident. He testified that all charges had been dismissed. His testimony was not clear how all the charges were dismissed. One person may have paid the ticket rather than go to Court (did not specify whether person pled guilty or no contest), others may have pled to deferred adjudication and received fines, or the cases may have been dismissed without fines (it was so long ago he could not remember exactly). He testified that the criminal charges were ambiguous to the district attorney

could not remember exactly). He testified that the criminal charges were ambiguous to the district attorney and court, therefore he was able to get the charges dismissed against everyone, including Cindy Bizena and Norman Jetty, Sr.

3. Norman Jetty Sr.

Through written responses and limited speech of affirmative or negative responses, Norman Jetty Sr. testified that he is the manager of Sherwoods. He was at the Ice House on Sunday, April 26, 1998, and knew that food had to be served in order to serve beer. He had visited with Mr. Westerfield, a compliance officer at TABC, about Section 105.05, months before the incident. Mr. Westerfield had given him a copy of the Section 105.05 and told him that just serving "chips and dips" would be in compliance. Every Sunday morning for six months prior to the arrests, Sherwoods had been open serving beer. Sherwoods had chosen to serve more than "chips and dips," electing to prepare a full course meal. On April 26, 1998, there were fourteen to sixteen patrons at Sherwoods when the officers arrived. At the time of the arrests there was bar-b-que, potato salad, pickles, onions, and bread on the premises. The potato salad was in the kitchen, the brisket was on the pit, and customers had brought in stuffed eggs and celery. No food was being served at the time the TABC agents were on the premises, but Sherwoods served food to over thirty-five persons by noon. There was food out prior to the officers' arrival that he had taken up right before the officers' arrival, and he was bringing the potato salad out of the kitchen when the officers made the arrests. It was Mr. Jetty's opinion that there was no food service for only one or two minutes. When the officers were making the arrests, he handed them a note telling them that he had met with Mr. Westerfield at the TABC. After the arrests, he met with Mr. Boyer and Mr. Donahoo with TABC to get a clarification of Section 105.05, so that Sherwoods would be in compliance in the future.

The written statement adds that the bar is open every Sunday morning at 7:00 a.m. to do a complete cleaning before 10:00 a.m. Most of the customers arrested were either helping with the housekeeping, cooking, or drinking coffee until 10:00 a.m. The customers do the cooking and bring covered dishes. The food is served as a buffet.

III. APPLICABLE LAW

Section 105.05 of the Code states:

"(b) ... On Sunday ... permittees or licensees authorized to sell for on-premise consumption may sell beer between 10:00 a.m. and noon if the beer is served to a customer during the service of food to the customer."

Staff has alleged Sherwoods has two violations from the events on April 26, 1998. One alleged violation is selling alcoholic beverages during prohibited hours in violation of Section 61.71 (a)(7) of the Code. And the other alleged violation is allowing consumption of alcoholic beverages during prohibited hours in violation of Section 61.71 (a)(18) of the Code.

The issue in this case is not that beer was sold and consumed, but whether or not Sherwoods sold beer and allowed the consumption of the beer "during the service of food to the customers."

If there are violations, TAC Chapter 37.60, Rules of the TABC, state that the penalty for the first violation of Section 105.01, et seq, Alcoholic Beverage Code is a 5 day suspension, and the second violation is a 7-10 day suspension. The Staff did not present any evidence of past violations.

Section 11.64 of the Code provides that the permittee or licensee shall be given the opportunity to pay a civil penalty rather than have the permit or license suspended of not less than \$150.00 or more than \$25,000 for each day the permit or license was to have been suspended.

IV. ARGUMENTS ON THE EVIDENCE

Sherwoods' argument is that Section 105.05 is an ambiguous statute whereby the peanuts on the bar is enough to qualify as serving food to customers. The Staff's argument is that beer cannot be served on Sunday mornings unless it is served with a meal. The Staff calls it the "Mimosa exception." The beer must be served to the customer along with food, either ordered off the menu or food ordered buffet style. If beer is served prior to food being served, then there is a violation. The Staff recommended a two week suspension on each count, or alternately, a \$300.00 a day fine.

V. APPLICATION OF LAW TO THE EVIDENCE

Officer Alba testified that he observed no food out at the Ice House. After the bartender served him beer, he ask where the food was. The bartender pointed to a bunch of persons drinking beer around a bar-b-que grill, and said food would be served soon. Mr. Jetty Sr. testified that the potato salad was in the kitchen, and that the customers were cooking the brisket. In his letter he states that the arresting officers told him chips and eggs were not legally considered food. There is no evidence that chips, peanuts, eggs, or any other type of appetizer were out for the customers. Even if they were, appetizers alone are not considered "service of food to the customer" in any situation. No matter what someone at TABC may have told Mr. Jetty Sr., they handed him the statute, and the statute speaks for itself. Further, Mr. Jetty Sr. himself wrote that the food is served as a buffet, and admitted that no food was being served when Officer Alba was served the beer.

The evidence of whether or not the customers and bartender were convicted is not relevant. Sherwoods presented evidence that everyone was found not guilty. But Sherwoods did not prove anyone was acquitted. Only an acquittal can be considered for res judicata purposes.

And the Staff did not prove anyone was convicted. There was testimony that one person may have paid the fine. No Court records, which the parties admitted would be the best evidence, were introduced into evidence. However, even if there was a conviction, it would not effect the issues in this case, since the issues and burden are different in a criminal case.

Sherwoods allowed the consumption of alcoholic beverages during prohibited hours by allowing its customers to sit around the bar-b-que pit drinking beer while cooking the brisket. Officer Alba testified that at 10:45 a.m., he saw around ten persons drinking beer, he saw a lot of beer cans, but he did not see any food being served. There was some evidence that food had been brought in by customers prior to 10:45 a.m. And Mr. Jetty, Sr. testified that over thirty-five customers were served food prior to noon. Mr. Jetty, Sr. admitted that no food was being served when the TABC agents were on the premises, and all the evidence suggests that up to 10:45 a.m. a buffet of food was being prepared.

Based on the evidence presented, the ALJ concludes that Sherwoods was serving beer, and allowing the consumption of beer on its premises, while preparing a buffet for its customers. Therefore, Sherwoods was in violation of Section 105.05 of the Code. TAC Chapter 37.60 recommends a 5 day suspension for the first violation, and up to a 10 day suspension for the second violation. Section 11.64 of the Code permits the violator to pay a \$300.00 a day fine in lieu of suspension.

VI. FINDINGS OF FACT

1. On or about June 25, 1998, the staff of the Texas Alcoholic Beverage Commission filed with the Office of the Attorney General a report alleging that Sherwoods committed violations of the Texas Alcoholic Beverage Code and/or the Rules of the Texas Alcoholic Beverage Commission.
2. Notice of hearing for August 3, 1999, was issued to all parties in the matter on June 10, 1999. Wesley Clements, Attorney for Sherwoods, filed a Motion for Continuance. The hearing was reset to September 8, 1999, by the State Office of Administrative Hearings and by the agreement of the parties.
3. The hearing on the merits was held on September 8, 1999, in Houston, Harris County, Texas. Staff appeared and was represented by Dewey Brackin, an attorney with the Commission. Sherwoods appeared and was represented by Wesley Clements, Attorney at Law. Following the presentation of the evidence, the record was closed on September 8, 1999.
4. Sherwoods is the holder of Permit No. BG-27916.
5. The licensed premises is in Harris County, Texas, and the venue was proper in Houston, Harris County, Texas.
6. On Sunday, April 26, 1998, at 10:45 a.m., Sherwoods sold an alcoholic beverage to Officer Alba.
7. On Sunday, April 26, 1998, at 10:45 a.m., Sherwoods was not serving food.
8. On Sunday, April 26, 1998, at 10:45 a.m., Sherwoods allowed ten persons to consume beer on its premises.
9. On Sunday, April 26, 1998, at 10:45 a.m., Sherwoods was in the process of preparing a buffet for its customers.

VII. CONCLUSION OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Section 61.71 (a) of the Texas Alcoholic Beverage Code (Code).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code Ann. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, Tex. Gov't Code Ann. Section 2001.051 and 2001.052.
4. Venue was proper in Houston, Texas, pursuant to 1 Tex. Admin. Code Section 155.13.
5. Based on the foregoing Findings, Sherwoods violated Section 105.05 of the Code on April 26, 1998.

6. Based on the foregoing Findings, and Conclusion No. 5, Sherwoods violated Section 61.71 (a)(7) Selling Beer During Prohibited Hours, and violated Section 61.71 (a)(18) Allowing Consumption of Alcoholic Beverages During Prohibited Hours.
7. TAC Chapter 37.60, Rules of the TABC, state that the penalty for the first violation of Section 105.01, et seq, Alcoholic Beverage Code is a 5 day suspension.
8. TAC Chapter 37.60, Rules of the TABC, state that the penalty for the second violation of Section 105.01, et seq, Alcoholic Beverage Code is no more than a 10 day suspension.
- 9.. Based upon the foregoing Findings and Conclusions, Permit No. BG279176 issued to Norman Lee Jetty Jr. doing business as Sherwoods Beer Garden should be suspended for 15 days.
8. Based upon Section 11.64 of the Code, Sherwoods should be given the option of paying a civil penalty in the amount of \$4,500.00.

Signed this 20 day of October, 1999.



DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS