

DOCKET NO. 588579

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| IN RE PEN CHUNG WU | § | BEFORE THE |
| D/B/A NORTH CHINA RESTAURANT | § | |
| PERMIT NO. MB162233 | § | |
| | § | TEXAS ALCOHOLIC |
| | § | |
| HARRIS COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-00-2021) | § | BEVERAGE COMMISSION |

O R D E R

CAME ON FOR CONSIDERATION this 22nd day of October 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Rex A. Shaver. The hearing convened and adjourned on January 4, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 25, 2001. 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. MB162233 shall be **SUSPENDED**.

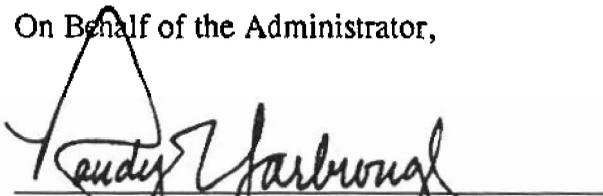
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 15th day of January 2002, all rights and privileges under the above described permit will be **SUSPENDED** for a period of ten (10) days, beginning at 12:01 A.M. on the 22nd day of January 2002.

This Order will become final and enforceable on November 19, 2001, 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 22nd ay of October 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/bc

The Honorable Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE (713) 812-1001

Jim L. Defoyd
ATTORNEY FOR RESPONDENT
1612 Richmond Ave.
Houston, Texas 77006
Via Fax (713) 528-5583 and
CERTIFIED MAIL NO. 7000 1530 0003 1927 6921

Pen Chung Wu
d/b/a North China Restaurant
RESPONDENT
879 Frostwood Dr.
Houston, Texas 77024
CERTIFIED MAIL NO. 7000 1530 0003 1927 6938

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 588579

REGISTER NUMBER:

NAME: PEN CHUNG WU

TRADENAME: NORTH CHINA RESTAURANT

ADDRESS: 879 Frostwood Drive, Houston, Harris County, Texas 77024

DATE DUE: January 15, 2002

PERMITS OR LICENSES: MB162233

AMOUNT OF PENALTY: \$1,500.00

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 15TH, DAY OF JANUARY, 2002, 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.

SOAH DOCKET NO. 458-00-2021

| | | |
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| TEXAS ALCOHOLIC BEVERAGE COMMISSION | § | BEFORE THE STATE OFFICE |
| | § | |
| | § | |
| VS. | § | OF |
| | § | |
| PEN CHUNG WU | § | |
| D/B/A NORTH CHINA | § | |
| RESTAURANT, PERMIT NO. | § | |
| MB162233 | § | |
| HARRIS COUNTY, TEXAS | § | |
| (TABC CASE NO. 588379) | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against Respondent Pen Chung Wu, a permittee of the commission, alleging that the Respondent possessed or permitted others to possess on the permitted premises any alcoholic beverage not covered by an invoice from the supplier that sold alcoholic beverage was purchased, in violation of TEX. ALCO. BEV. CODE § 28.06(a) & (b).¹ The staff recommended that the Respondent's permit be suspended for 20 days or that in lieu thereof, Respondent be permitted to pay a civil penalty of \$150.00 per day for a total penalty of \$3,000.00. The ALJ concluded that the permittee violated TEX. ALCO. BEV. CODE § 28.06(a), that the Respondent's permit should be suspended for 10 days or in lieu thereof Respondent be permitted to pay a civil penalty of \$150.00 per day for a total penalty of \$1,500.00.

I. Procedural History

By Notice of Hearing dated July 28, 2000, and by Amended Notice of Hearing dated September 12, 2000, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Pen Chung Wu d/b/a North China Restaurant that the Staff would seek disciplinary action against its permit because it possessed or permitted others to possess on the permitted premises, alcoholic

¹At the hearing the staff withdrew the allegation of any violation of TEX. ALCO. BEV. CODE § 28.06(b).

beverages not covered by an invoice from the supplier that sold it the alcoholic beverage. The Staff asserted that Respondent's action constituted grounds for suspension or cancellation of its Mixed Beverage Permit.

On January 4, 2001, the hearing commenced, pursuant to the Amended Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Christopher Burnett, of the TABC Legal Section. The Respondent, Pen Chung Wu d/b/a North China Restaurant, was represented by his attorney Jim L. Defoyd.

II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (The Code) §§ 6.01 and 11.61. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Chapter 2003.

The Respondent is the holder of Mixed Beverage Permit MB-162233 and held that permit on the date of the alleged violation. On September 12, 1999, the Amended Notice of Hearing in this matter was mailed to the Respondent at 879 Frostweed Drive, Houston, Texas, 77024. Respondent received the notice pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §11.61(b)(2),.

Section 28.06 (a) of the Code provides:

No holder of a mixed beverage permit, nor any officer, agent or employee of a holder, may possess or permit to be possessed on the premises for which the permit is issued any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.

B. Evidence

Two exhibits were offered by TABC and both were admitted into evidence without objections. TABC's exhibits included: (1) TABC records including copies of the Respondent's permit and violation history, (2) three bottles of wine seized at the premises. At the conclusion of the hearing the bottles of wine were withdrawn from the record by agreement. The Respondent offered no documentary evidence. TABC Agent Brian Allen testified for TABC. Benjamin Wu, son of the permit holder, testified for the Respondent. No other witnesses were called. The undersigned ALJ took official notice of the Notice of Hearing and Amended Notice of Hearing issued in this case.

1. TABC's Evidence

TABC's Exhibit No.1 shows that the Respondent was issued Mixed Beverage Permit, MB-162233 on July 12, 1984. The Respondent's permit has been continuously renewed since that date. The premises covered by the permit is known as North China Restaurant located at 879 Frostwood Dr., Houston, Texas, 77024.

TABC Agent Brian Allen testified that on March 9, 2000, he performed a routine inspection of the premises. He stated that he was looking for any violations of the Texas Alcoholic Beverage Code. During that inspection Agent Allen requested Respondent to provide invoice(s) from the supplier to cover bottles of wine stored on the premises. This request was made through Benjamin Wu who acted as an interpreter. Respondent was unable to provide the requested invoices for three bottles of wine.

During cross examination Agent Allen stated that he was aware of TABC rules that allowed free samples of wine to be given to a Permittee by a manufacturer or wholesaler under some circumstances. He was also aware that Rule 45.117(c) allows that manufacturers and wholesalers may furnish advertising specialties to retailers. The witness testified that holders of mixed beverage permits must keep invoices for a period of five years. He did cite the rule or statute upon which he relied.

TABC's Exhibit No. 2 consisted of three 750ml bottles of wine: Paul Cheneau Brut, Perrier Jouet and Domain St. Michelle. Agent Allen identified these as the bottles of wine for which the Respondent could not provide an invoice from the supplier and which he seized. The witness confirmed that his search uncovered no chilled wines of the brands he seized.

2. Respondent's Evidence and Argument

Mr. Benjamin Wu testified that he is the son of Respondent Pen Chung Wu and was present at the North China Restaurant on March 9, 2000 during the inspection by Agent Brian Allen. Benjamin Wu stated that he worked at the North China Restaurant with his father. This witness confirmed that no invoice was available to cover any of the three bottles of wine. He contended that all three of the bottles were given to his father by a wholesaler named "Old Beverage" eight to ten years before the inspection.

Benjamin Wu stated that while the restaurant does sell other brands of wine, the three bottles in question were not for sale. If a sale was intended then a bottle of the same brand would be kept cold. The bottles in question were being used to fill wine racks installed in the seating area three years previously. The witness stated that it was the restaurant's practice to throw out invoices after five years.

The Respondent argued that the alcoholic beverages were possessed only as decoration and not for sale. The Respondent also contended that the three wine bottles were given to the Respondent as a permissible gift by a wholesaler eight to ten years before the inspection and that there was either no invoice or if there had ever been an invoice there was no requirement to produce it because it was more than five years had elapsed. Respondent further alleged that the three bottles of wine could be considered a gift to a retailer pursuant to TABC Rule § 45.117 (c).

IV. ANALYSIS AND RECOMMENDATION

A. Analysis

The question here is not how or when the alcoholic beverages came into Respondents possession but was that possession covered by an invoice from the supplier. There is no dispute that invoices from the supplier were not provided by the Respondent. Section 28.06 contains no time period after which the retention of the suppliers invoice not required. It requires an invoice for any alcoholic beverage on the permitted premises. The same requirement applies in the event that the bottles were samples provided pursuant to Section 102.02 and in that case the product may only be sampled by the permittee if the wholesaler is present. Testimony by the Agent was that no wholesaler was present during the inspection. Respondent contention that the three bottles of wine could be considered a gift to a retailer pursuant to TABC Rule §45.117(c) is not persuasive. That rule concerns Gifts to Retailers of "Advertising specialties" which are defined in that rule as "things designed to advertise or promote a specific product or brand. Such items may have a utilitarian function in addition to product promotion." It is clear that an advertising specialty does not include the actual product or brand itself.

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Code or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b), & 11.61(b)(2). The preponderance of the evidence indicates the Respondent violated Section 28.06(a) of the Code.

The Staff recommended Respondent be assessed a 20-day suspension of his permit or in lieu of the suspension be assessed a penalty of \$150.00 per day for a total \$3,000.00.

The copy of the permit and violation history provided by TABC show that in the 16 years prior to this violation only one violation was recorded. A knowing violation under Section 28.06 (c) was not alleged. For these reasons the ALJ finds that the Staff recommendation should be modified. The ALJ recommends that the Respondent be assessed a ten-day suspension of its permit or, in lieu of the suspension be assessed a penalty of \$150.00 per day for a total of \$1,500.00.

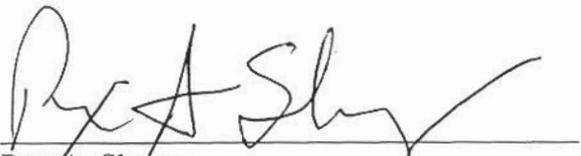
V. PROPOSED FINDINGS OF FACT

1. Pen Chung Wu d/b/a North China Restaurant (Respondent) holds a Mixed Beverage permit issued by the Texas Alcoholic Beverage Commission.
2. The premises for which the permit is issued is 879 Frostweed Dr. Houston, Texas.
3. On March 9, 2000, Respondent was in possession, on the permitted premises, of three bottles of wine for which there was no covering invoice from the supplier from whom the alcoholic beverage was purchased.
4. On September 12, 2000, notice of the hearing to consider sanctions against Respondent was sent by certified mail, return receipt requested, to Respondent at 879 Frostweed, Houston, Texas.
5. The Respondent or its agent received the notice of hearing.
6. The hearing to consider the allegation convened on January 4, 2000, before Administrative Law Judge Rex A. Shaver with the State Office of Administrative Hearings (SOAH) in the SOAH offices at 2020 North Loop West, Suite 111, Houston, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by counsel, Jim L. Defoyd.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV CODE ANN. §§6.01(b) & 11.61(b)(2).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051 and .052.
4. Based on Findings of Fact Numbers 1-3, the Respondent was the holder of a mixed beverage permit and possessed on the premises for which the permit was issued an alcoholic beverage which was not covered by an invoice from the supplier from whom the beverage was purchased.
5. Based on the foregoing Findings of Fact and Conclusions of Law, TABC is warranted in suspending the Respondent's permit for a period of ten days. TEX. ALCO. BEV CODE ANN. §§6.01(b), 11.61(b)(2). and 61.71.
6. Pursuant to TEX. ALCO. BEV CODE ANN. § 11.64, Respondent should be permitted to pay a civil penalty \$1,500.00 in lieu of a suspension.

Signed this 25th day of September, 2001.


Rex A. Shaver
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS