

DOCKET NO. 600201

IN RE I GOTCHA INC.	§	BEFORE THE
D/B/A ILLUSIONS	§	
PERMIT/LICENSE NOS. MB158142,	§	
LB158143	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-3248)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 19th day of April, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on March 4, 2005, and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 23, 2005. 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 in this cause.

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 Respondent's permits be **SUSPENDED**.

IT IS THEREFORE ORDERED, that pursuant to Conclusion of Law No. 4, Respondent is to pay a civil penalty in the amount of **\$750.00** on or before the **15th day of June, 2005**, or all rights and privileges under the above described permits will be **SUSPENDED for a period of five (5) days, beginning at 12:01 A.M. on the 22nd day of June, 2005; and**

IT IS FURTHER ORDERED, that pursuant to Conclusion of Law No. 6, Respondent is to pay a civil penalty in the amount of **\$750.00** on or before the **15th day of June, 2005**, or all rights and privileges under the above described permits will be **SUSPENDED for an additional period of five (5) days, beginning at 12:01 A.M. on the 27th day of June, 2005.**

This Order will become final and enforceable on May 10, 2005, 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.

SIGNED on this 19th day of April, 2005.

On Behalf of the Administrator,



Jeannette Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

John Gamboa
ATTORNEY FOR RESPONDENT
Via Fax (817) 885-8504

I GOTCHA INC.
d/b/a ILLUSIONS
7405 Camp Bowie West
Fort Worth, TX 76116
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1930 1814

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 600201

REGISTER NUMBER:

NAME: I GOTCHA INC.

TRADENAME: ILLUSIONS

ADDRESS: 7405 CAMP BOWIE WEST, FORT WORTH, TX 76116

DATE DUE: June 15, 2005

PERMITS OR LICENSES: MB158142, LB158143

AMOUNT OF PENALTY: \$750.00

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 JUNE 2005, 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.

TEXAS ALCOHOLIC BEVERAGE COMMISSION

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Signature of Responsible Party

Street Address P.O. Box No.

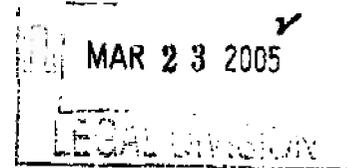
City State Zip Code

Area Code/Telephone No.

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



4-7

March 23, 2005

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

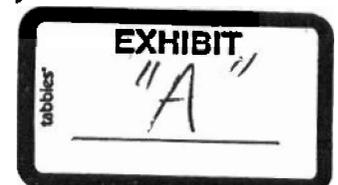
VIA FACSIMILE 512/206-3498

**RE: Docket No. 458-05-3248; Texas Alcoholic Beverage Commission vs I Gotcha, Inc.
d/b/a Illusions (TABC Case No. 600201)**

Dear Mr. Steen:

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 Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to John Gamboa, Attorney for the Respondent. The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against I Gotcha, Inc. d/b/a Illusions (Respondent), alleging two violations of the Texas Alcoholic Beverage Code (the Code). In TABC Staff's notice of hearing, it alleged that Respondent allowed a breach of the peace on the licensed premises on November 16, 2001, that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises when Carrie Cashman and Karen Blair became involved in a fight or assault at the licensed premises. TABC Staff further alleged that Respondent violated the Code because it failed to promptly report this breach of the peace to TABC. TABC Staff requested that Respondent's permits be suspended for 20 days, or in lieu of anysuspension, that Respondent pay a civil penalty in the amount of \$3,000 in relation to the breach of the peace violation. TABC Staff further requested a five-day suspension of Respondent's permit, or a civil penalty in the amount of \$750, for the violation of failing to report a breach of the peace to TABC.

The Administrative Law Judge (ALJ) finds the evidence was sufficient to establish that a breach of the peace occurred on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises. However, due to mitigating factors established in the hearing, the ALJ recommends that Respondent's permits be suspended for a period of five days, or in lieu of any permit suspension, that Respondent be allowed to pay a civil penalty in the amount of \$750. Further, the evidence supports that Respondent failed to promptly report this breach of the peace to TABC. Accordingly, the ALJ agrees with TABC Staff that a five-day suspension of Respondent's permits, or payment of a civil penalty in the amount of \$750 in lieu of any permit suspension, is appropriate.



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 Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Tanya Cooper
Administrative Law Judge

TC/ds
attachments

John Gamboa, Attorney for Respondent, VIA FACSIMILE 817/885-8504
Timothy Griffith, TABC Staff Attorney, VIA FACSIMILE 972/547-5093

DOCKET NO. 458-05-3248

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

V.

OF

I GOTCHA, INC. D/B/A
ILLUSIONS, Respondent
TARRANT COUNTY, TEXAS
(TABC CASE NO. 600201)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against I Gotcha, Inc. d/b/a Illusions (Respondent), alleging two violations of the Texas Alcoholic Beverage Code (the Code). In TABC Staff's notice of hearing, it alleged that Respondent allowed a breach of the peace on the licensed premises on November 16, 2001, that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises when Carrie Cashman and Karen Blair became involved in a fight or assault at the licensed premises. TABC Staff further alleged that Respondent violated the Code because it failed to promptly report this breach of the peace to TABC. TABC Staff requested that Respondent's permits be suspended for 20 days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$3,000 in relation to the breach of the peace violation. TABC Staff further requested a five-day suspension of Respondent's permit, or a civil penalty in the amount of \$750, for the violation of failing to report a breach of the peace to TABC.¹

¹ The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found after notice and hearing, that any the permittee/retail dealer violated a provision of this Code or rule of the Commission. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 61.71(a)(1).

All provisions of this Code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit. TEX. ALCO. BEV. CODE ANN. § 29.03.

The Administrative Law Judge (ALJ) finds the evidence was sufficient to establish that a breach of the peace occurred on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises. However, due to mitigating factors established in the hearing, the ALJ recommends that Respondent's permits be suspended for a period of five days, or in lieu of any permit suspension, that Respondent be allowed to pay a civil penalty in the amount of \$750. Further, the evidence supports that Respondent failed to promptly report this breach of the peace to TABC. Accordingly, the ALJ agrees with TABC Staff that a five-day suspension of Respondent's permits, or payment of a civil penalty in the amount of \$750 in lieu of any permit suspension, is appropriate.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice or jurisdiction in this proceeding. Therefore, those issues are addressed only in the Findings of Facts and Conclusions of Law.

On March 4, 2005, a hearing convened before ALJ Tanya Cooper, at the SOAH offices located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared through its representative, Waldron "Walt" Duncan, and was represented by John Gamboa, attorney at law. The hearing concluded and the record closed on that same day.

II. EVIDENCE

Respondent holds a Mixed Beverage Permit, MB158142, and a Mixed Beverage Late Hours Permit, LB158143, issued by TABC for Respondent's premises, I Gotcha, Inc., d/b/a Illusions, located

Permittee means a person who is the holder of a permit provided for in this Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11).

SOAH DOCKET NO. 458-05-3248

PROPOSAL FOR DECISION

PAGE 3

at 7405 Camp Bowie West, Fort Worth, Texas. Respondent's permits were initially issued on December 16, 1983, and have been continuously renewed since that date. Brent Roberts, Walt Duncan, and Blanchies Johnson testified at the hearing.

A. TABC Staff's Evidence.

TABC Staff's Exhibit 3, Respondent's Response to Petitioner's Requests for Admissions, established certain facts to be determined in this matter.² TABC Staff's Exhibit 5 contains statements from the persons who were involved in a confrontation at the licensed premises on November 16, 2001, Carrie Cashman and Karen Bair.³ Additionally, TABC Staff presented the testimony of TABC Agent Brent Roberts in support of its allegations.

The statements from Ms. Cashman and Ms. Bair describe a physical confrontation that occurred on November 16, 2001, at the licensed premises, Illusions. Ms. Cashman was at the licensed premises to visit its manager, Mike Williams. After a brief conversation with Mr. Williams (approximately 10 to 15 minutes), Ms. Cashman was preparing to leave when Ms. Bair approached her near the licensed premises' kitchen. Ms. Bair, who was working at Illusions that night, heard Ms. Cashman was at the licensed premises and went to confront her about items of clothing and jewelry she believed Ms. Cashman had stolen from her. A scuffle between the two women ensued with Ms. Cashman being struck in her head

² Respondent admitted the following matters in its Response to TABC Staff's Request for Admissions:

Response 6: Karen Blair was the Respondent's agent, employee, and/or servant, who failed to prevent, stop, or avoid the fight or assault which occurred on or around November 16, 2001.

Response 8: A breach of peace involved a fight or assault between Carrie Cashman and Karen Blair occurred on or about November 16, 2001.

³ Evidence admitted in this matter reflects two spellings for the last name of Respondent's employee, agent or servant, Karen. These spellings are "Blair" and "Bair." No evidence was offered to suggest that these are two different individuals. Ms. Bair's handwritten statement shows her name as "Bair." Accordingly, this is the spelling which will be used by the ALJ when referencing her.

SOAH DOCKET NO. 458-05-3248

PROPOSAL FOR DECISION

PAGE 4

with a metal purse by Ms. Bair. Mr. Williams and the bouncer at Illusions, Jeffery Buchanan, intervened and escorted Ms. Cashman from the premises to her car parked outside. Ms. Cashman had sustained a lump on the back of her head, but was otherwise uninjured. Ms. Cashman reported the altercation to the police.

Agent Brent Roberts said the first report concerning this incident came to his attention from the Fort Worth Police Department in January 2002. He began his investigation into the report in April 2002. Agent Roberts cited other work assignments and difficulties in locating some individuals with direct knowledge concerning the incident as factors that resulted in the delay between the alleged violations and his investigating, and ultimately citing, Respondent for these violations. Agent Roberts testified that he has reviewed TABC Staff's records on several occasions concerning this matter, and Respondent has yet to file any report with TABC concerning the breach of the peace that occurred at the licensed premises on November 16, 2001.

B. Respondent's Evidence.

Walt Duncan, Respondent's representative, testified at the hearing. During his testimony, several records, referred to as Incident Reports, maintained by Respondent to document unusual events occurring on the licensed premises, were produced concerning the incident involving Ms. Cashman and Ms. Bair on November 16, 2001. These records describe actions by Respondent's employees or agents involved in the confrontation between Ms. Cashman and Ms. Bair.

Other employees' accounts of the incident in Respondent's records reveal that Ms. Cashman was leaving the premises when Ms. Bair approached her about items taken from Ms. Bair. According to Ms. Bair's statement, Ms. Cashman pushed her first, and she then defended herself. All statements suggest the incident was handled quickly by Ms. Buchanan and Mr. Williams once they were aware that a physical confrontation was ongoing.

SOAH DOCKET NO. 458-05-3248

PROPOSAL FOR DECISION

PAGE 5

Blanchies Johnson, a dancer at Respondent's licensed premises, said she witnessed the incident between Ms. Bair and Ms. Cashman. Ms. Johnson said that she knew both women. Ms. Johnson testified that Ms. Cashman had been fired from Illusions because it was claimed that Ms. Cashman had stolen clothes from Ms. Bair.

According to Ms. Johnson, Ms. Cashman was mad because she had been fired and confronted Ms. Bair. Ms. Johnson said that a verbal exchange occurred between Ms. Cashman and Ms. Bair, then, Ms. Cashman pushed Ms. Bair.

Ms. Johnson testified that the struggle occurred spontaneously and without out any warning. In Ms. Johnson's opinion, there had been no real opportunity to stop the altercation; but she said that once Respondent's manager and bouncer saw Ms. Bair and Ms. Cashman in a physical altercation, they intervened immediately.

III. ANALYSIS

A. Breach of the Peace on the Licensed Premises.

The issues to be determined concerning this alleged violation are:

1. Whether a breach of the peace occurred on Respondent's licensed premises;⁴ and
2. If so, whether the breach of the peace was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises or on a premises under its control. TEX. ALCO. BEV. CODE ANN. § 69.13.⁵

⁴ Premises means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. TEX. ALCO. BEV. CODE ANN. § 11.49(a). See also TEX. ALCO. BEV. CODE ANN. § 1.04(19).

⁵ See also TEX. ALCO. BEV. CODE ANN. § 71.09.

“Breach of the peace,” is not defined by the Code or TABC Rules. However, it has been judicially defined in case law as an act that disturbs or threatens to disturb “the tranquility enjoyed by the citizens” and includes actual or threatened violence as an essential element. Woods v. State, 213 S.W.2nd 685 (Tex. Crim. App. 1948). It is undisputed that on November 16, 2001, Respondent’s employee, agent, or servant, Karen Bair, failed to prevent, stop, or avoid a fight or assault which occurred on the licensed premises.⁶ As a result, the evidence presented in this matter established that a breach of the peace occurred on Respondent’s licensed premises on that date.⁷

TABC Staff has requested assessment of 10-day suspension of Respondent’s permits, or in the alternative, payment of a civil penalty in the amount of \$1500.⁸ However, after considering the evidence presented in this matter, the ALJ believes that the penalty assessed should be lessened due to mitigating factors described within the record. Apparently, Ms. Cashman’s appearance at the licensed premises after being terminated, or that even if she did return to the premises, a physical altercation would occur between Ms. Cashman and Ms. Bair was not foreseen by Respondent’s employees. As the testimony of Ms. Johnson proved, the struggle was spontaneous and could not have been reasonably foreseen or prevented once the two women were in direct contact with each other. Ms. Cashman was angry due to being fired. She was responsible for escalating the confrontation from verbal to physical by pushing Respondent’s employee, Ms. Bair, who had approached Ms. Cashman to discuss her missing clothing and jewelry. After being pushed, Ms. Bair believed it was necessary to defend herself. When a physical struggle began, Respondent’s employees who were primarily responsible for maintaining supervision and control over persons on the premises, Mr. Williams and Mr. Buchanan, moved swiftly to intervene and

⁶ See TABC Exhibit #3, Respondent’s Response to Petitioner’s Request for Admissions No. 6.

⁷ See TABC Exhibit #3, Respondent’s Response to Petitioner’s Request for Admissions No. 8.

⁸ TABC Staff’s requested penalty is the minimum penalty for this violation as provided pursuant to 16 TEX. ADMIN. CODE § 37.06 for settlement of this type of case. The penalty chart provided for in the Rules may serve as guidance to the ALJ, however it is not binding.

SOAH DOCKET NO. 459-05-3248

PROPOSAL FOR DECISION

PAGE 7

separated the two women. Based upon these factors, the ALJ believes that a five-day suspension of Defendant's permits, or payment of a civil penalty in the amount of \$750, is appropriate for this violation.

B. Failure to Report a Breach of the Peace on the Licensed Premises.

As discussed above, a breach of the peace occurred on the licensed premises on November 16, 2001. This incident was reported to the Fort Worth Police Department by Ms. Cashman, and police officers, M. Ornales and B. Jones, visited Respondent's premises on November 17, 2001, in relation to Ms. Cashman's report. (See Respondent's Exhibit No. 2-Incident Report prepared by Jim Sader, Manager on Shift, on November 17, 2001). TABC Agent Roberts testified that, to date, no report of this violation has been made by Respondent to TABC.

For these reasons, the ALJ finds that Respondent's permits should be suspended for an additional period of five days, or in lieu of any suspension, that Respondent should be allowed to pay a civil penalty in the amount of \$750 for this violation.

IV. RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for a period of ten days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$1500 for allowing a breach of the peace on the licensed premises, and for failing to promptly report this breach of the peace to TABC.

V. PROPOSED FINDINGS OF FACT

1. I Gotcha Inc. d/b/a Illusions (Respondent) holds a Mixed Beverage Permit, MB158142, and a Mixed Beverage Late Hours Permit, LB158143, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 7405 Camp Bowie West, Fort Worth, Tarrant County, Texas.
2. On November 16, 2001, Karen Bair was an employee, agent, or servant at Respondent's licensed

premises described in Finding of Fact No. 1.

3. On that day, Ms. Bair failed to prevent, stop, or avoid the fight or assault which occurred between herself and Carrie Cashman, a former employee of Respondent.
4. Shortly after the altercation was stopped by Respondent's employees, Mike Williams and James Buchanan, Ms. Cashman reported the incident described in Finding of Fact No. 3 to the Fort Worth Police Department.
5. Respondent never reported the altercation described in Findings of Fact Nos. 3 and 4 to TABC.
6. A hearing in this matter was conducted on March 4, 2005, at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. ALJ Tanya Cooper presided. TABC Staff was represented by TABC Staff Attorney, Timothy Griffith. Respondent was represented by John Gamboa, attorney at law. The hearing concluded and the record closed on that day.

VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 26, §§ 6.01, 11.61, 24.11, 61.71, 69.13, 71.09, and 104.01 and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*
2. 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, pursuant to TEX. GOV'T CODE ANN. chs. 2001 and 2003.
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Proposed Findings of Fact Nos. 1 - 3, a breach of the peace occurred on the licensed premises that was not beyond the control of Respondent and resulted from Respondent's improper supervision of persons on the premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 28.11, 61.71(a)(1), 69.13 and 71.09.
5. Based on the foregoing Findings of Fact Nos. 1 - 3 and Conclusion of Law No. 4, Respondent's Mixed Beverage Permit, MB158142, and Mixed Beverage Late Hours Permit, LB158143, issued by TABC should be suspended for a period of five days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$750.

SOAH DOCKET NO. 458-05-3248

PROPOSAL FOR DECISION

PAGE 9

6. Based upon Findings of Fact Nos. 1 - 5, Respondent or its agent, employee, or servant, failed to promptly report a breach of the peace occurring on the licensed premises to the TABC in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(21) and 61.71(a)(31).
7. Based on the foregoing Findings of Fact Nos. 1 - 5 and Conclusion of Law No. 6, Respondent's Mixed Beverage Permit, MB158142, and Mixed Beverage Late Hours Permit, LB158143, issued by TABC should be suspended for an additional period of five days, or in lieu of any suspension, Respondent should be allowed to pay another civil penalty in the amount of \$750.

SIGNED March 23, 2005.



TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings