

DOCKET NO. 604091

IN RE RICKY TORRES	§	BEFORE THE
D/B/A TEJANO BOOM NIGHT CLUB	§	
PERMIT/LICENSE NO. BG509016,	§	
BL509017	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0215)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of January 2006, 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 November 4, 2005, and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 21, 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. Exceptions were filed in this cause.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, the changes to the Findings of Fact and Conclusions of Law recommended by the Administrative Law Judge contained in a letter dated January 12, 2006 (**attached hereto as Exhibit "B"**), 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, as modified in accordance with the changes recommended by the Administrative Law Judge in a letter dated January 12, 2006, 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**.

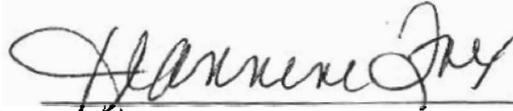
IT IS THEREFORE ORDERED that unless Respondent pays a civil penalty in the amount of \$750.00 on or before the **24th** day of **March 2006**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the **31st** day of **March 2006**.

This Order will become final and enforceable on **February 14, 2006**, 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 24th day of January 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 731-1964

Patricia Cole
ATTORNEY FOR RESPONDENT
VIA FAX (817) 336-2181

Ricky Torres
d/b/a Tejano Boom Night Club
RESPONDENT
3510 North Grove St.
Fort Worth, TX 76106
CERTIFIED MAIL/RRR NO. 7001 2510 0000 7274 4486

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604091

REGISTER NUMBER:

NAME: RICKY TORRES

TRADENAME: TEJANO BOOM NIGHT CLUB

ADDRESS: 3510 North Grove Street, Fort Worth, Texas

DATE DUE: March 24, 2006

PERMITS OR LICENSES: BG509016, BL509017

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 24TH DAY OF MARCH 2006, 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.

LEGAL

DOCKET NO. 458-06-0215

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

V.

OF

RICKY TORRES D/B/A TEJANO
BOOM NIGHT CLUB,
Respondent
(TABC CASE NO. 604091)

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Ricky Torres d/b/a Tejano Boom Night Club (Respondent), alleging four violations of the Texas Alcoholic Beverage Code (the Code).¹ In TABC Staff's notice of hearing, it alleged that on or before January 1, 2003, Respondent's agent or employee, Rosa Deleon, or some other person,

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 the permittee/licensee violated a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 61.71(a)(1).

* * * * *
The provisions of this code applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit. TEX. ALCO. BEV. CODE ANN. § 25.04
* * * * *

All provisions of this 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 § 70.03.
* * * * *

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

Person means a natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any them. TEX. ALCO. BEV. CODE ANN. § 1.04(6).
* * * * *



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acquired an alcoholic beverage for the purpose of resale from another retail dealer.² Second, TABC Staff alleged that Respondent failed to supply records concerning his licensed premises' operations to TABC Agent Tana Travis on or before February 21, 2003.³ Third, TABC Staff alleges that on or about December 20, 2001, Respondent made a false statement or a misrepresentation in an original or renewal application by his failure to disclose that he had been previously employed by Double J's Bar, another licensed premises. Lastly, it is alleged that Respondent made another false statement or misrepresentation by failing to state that Glenda Deleon resided in Respondent's household.⁴ TABC Staff sought cancellation of Respondent's permit and license in relation to these allegations.

The Administrative Law Judge (ALJ) finds the evidence was not sufficient to establish that Respondent's employee, Rosa Deleon, or any other person acquired alcoholic beverage from another retailer dealer for resale at Respondent's licensed premises. Further, TABC Staff did not establish that Respondent failed to provide records concerning the operation of his licensed premises or that he made false statements on his permit and license application. Accordingly, the ALJ recommends that no enforcement action be taken against Respondent's permit or license.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 25, 61, and 70, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.* (the Rules). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing

² The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premises license if it is found that the licensee acquired an alcoholic beverage for the purpose of resale from another retail dealer of alcoholic beverages. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(20).

³ The commission may require the filing of reports and other data by persons engaged in the alcoholic beverage business which the commission finds necessary to accomplish the purposes of this Code. TEX. ALCO. BEV. CODE ANN. § 5.32.

⁴ The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premises license if it is found that the licensee made a false statement or a misrepresentation in his original application or a renewal application. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(4).

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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. chs. 2001 and 2003. Notice and jurisdiction were not contested issues in this proceeding and are addressed in the findings of fact and conclusions of law without further discussion.

On November 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 and was represented by Patricia Cole, attorney at law. The hearing concluded on that same day, but the parties requested that the record remain open in order to allow them the opportunity to provide the ALJ with proposed findings of fact and conclusions of law. The record closed on November 21, 2005.

II. EVIDENCE

Respondent holds a Wine and Beer Retailer's Permit, BG 509016, and a Retail Dealer's On-Premises Late Hours License, BL509017, issued by the TABC for Respondent's premises located at 3510 North Grove Street, Fort Worth, Tarrant County, Texas 76106. Respondent's permits were initially issued on February 14, 2002, and have been continuously renewed since that date. TABC Agent Tana Travis, Glenda Deleon, and Respondent testified at the hearing.

A. TABC Staff's Evidence.

Agent Travis stated that she was present at Respondent's licensed premises on January 1, 2003, conducting an inspection of the premises. While there, Agent Travis said that she came into contact with Rosa Deleon. Ms. Deleon was working as a bartender at the main bar of Respondent's licensed premises that evening. Agent Travis testified she observed several bottles of champagne behind the bar; three bottles were empty and six bottles were still full. Agent Travis inquired about the source of these bottles, and Ms. DeLeon said the bottles had been purchased at Magic Liquor. A Magic Liquor price sticker, reflecting \$3.99, was affixed to the bottles. According to Agent

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Travis, Magic Liquor holds a retail package store license, not a wholesaler or distributors license. As a result, Magic Liquor would be an unauthorized source of alcoholic beverage for resale at a licensed premises such as Respondent's. Agent Travis concluded that the champagne was for unlawful resale at Respondent's business because the bottles were behind the bar; there were a number of bottles on hand; and retail price stickers were still visible on the bottles.

Next, Agent Travis testified that on February 8, 2003, TABC Staff received a complaint concerning Respondent's licensed premises. Because of the complaint, TABC Staff began an investigation concerning Respondent's operations. Agent Travis said that on February 11, 2003, she visited Respondent's home and delivered a list of documents that Respondent was requested to produce for inspection.⁵ Glenda Deleon, Respondent's sister-in-law, answered the door and accepted the record request from Agent Travis for Respondent. (See TABC Exhibit # 4.) The items on the list were required to be produced for inspection by February 21, 2003. Agent Travis stated that Respondent provided TABC Staff with utility bills bearing Respondent's name, invoices for beer purchases, Respondent's W-2 for 2002, and copies of money orders paid to the State Comptroller. Records that Respondent did not produced as requested included his 2002 income tax return, any bank records or business records such as ledgers, spreadsheets, cash register tapes, or payroll records

⁵ Item requested by TABC Staff included: "Any ledgers, spreadsheets, purchase invoices, cash register tapes/source documents, sales tax records and nay other accounting records which pertain to the licensed establishment known as Tejano Boom Night Club; All bank statements pertaining to accounts (business or personal) to which you or your accountant are a party, in which transactions are conducted on behalf of the licensed establishment known as Tejano Boom Night Club; All records of transactions for the above-mentioned accounts, including cancelled checks, deposit slips, withdrawal slips, and transfer-of-fund receipts; Signature cards for all bank accounts and applications to open any accounts through which transactions occur for Tejano Boom Night Club; Payroll records for all employees of Tejano Boom Night club and employee income tax records for Tejano Boom Night Club. Also provide copies of any employee W-2 forms issued and receipts for any cash payments made to employees; Any partnership agreements involving Tejano Boom Night Club or Ricky Torres and any additional business records in which Tejano Boom Night Club is a party; Copies of personal income tax returns for yourself for the year of 2002. Copies of all tax records pertaining to the licensed establishment known as Tejano Boom Night Club for the year 2002; Copies of all contracts, loans, promissory notes and agreement pertaining to Tejano Boom Night Club, Ricky Torres and any other 3rd party; Documentation which shows the initial investment of each party involved in Tejano Boom Night Club; Copies of any insurance policies or security agreements taken out by Ricky Torres or any other 3rd party for the business knows as Tejano Boom Night Club; Copies of water, telephone, and electric bills for the time period of January 2002 through the present for the location knows as Tejano Boom Night Club to include copies of cancelled checks or money orders used to pay these respective bills; and Copies of any lease agreements for the location of 3510 N. Grove."

for employees, and the lease for the location.

Agent Travis met with Respondent after reviewing the records he produced. Agent Travis' report concerning that meeting indicated that when Respondent was asked about his 2002 tax return, Respondent said that it had not been completed until recently, and that he thought his Haltom City W-2 had satisfied TABC Staff's request. Respondent also told Agent Travis that he did not have a business bank account, and that the account previously listed on his application was his personal account. He further said that no employee payroll records (i.e. W-2s, cancelled checks, etc.) existed because he did not employ any personnel; all persons that helped in the operation of Respondent's licensed premises were family members and were not paid.

According to Agent Travis, to date none of these requested items, other than those previously mentioned, have been received by TABC Staff. In Agent Travis' opinion, these documents were material to TABC Staff's investigation concerning the complaint that it received on February 8, 2003, which alleged that a subterfuge was ongoing in the operations at Respondent's licensed premises.

Agent Travis testified that she and Respondent met again on February 28, 2003. During that meeting, Respondent told Agent Travis that he had worked as a disc jockey (D.J.) at Double J's Bar. According Agent Travis, Double J's had an active TABC-issued license from October 1999, through April 2001, but that operations at Double J's location had been problematic. Ultimately, Double J's permit had been cancelled for cause. (See TABC Exhibit # 8.) Respondent did not specify the time period he worked at Double J's, but Agent Travis said that once Respondent had revealed this information to her, she recalled having seen him at Double J's. Agent Travis stated that Respondent did not include this information on his Personal History Sheet, which was a part of his application for the premises, Tejano Boom Night Club, filed by with TABC Staff on December 20, 2001 (See TABC Exhibit #6, Question 10). Agent Travis testified that the Personal History Sheet requests disclosure of an applicant's employment history for three years prior to the application's date and is an essential part of the application process.

Further during the interview, Agent Travis stated that Respondent told her that Joe and Glenda Deleon resided with him for 15 months following October 1, 2001, to aid in caring for Respondent's father, Salvador Torres. This information was not included within Respondent's application according to Agent Travis. (See TABC Exhibit #6, Question 3). Agent Travis testified that disclosure of persons comprising any permit or license applicant's household is important in order for the TABC Staff to determine if there are any illegal interests involved in the operation of a licensed premises.

Respondent provided Agent Travis with an affidavit (TABC Exhibit 5) describing his relationship with members of the Deleon family. Joe Deleon is Respondent's brother, and his wife, Glenda, is Respondent's sister-in-law. Joe and Respondent's father is Salvador Torres. Rosa Deleon is also Respondent's sister-in-law. She is married to another of Respondent's brothers, Jesse Deleon, Sr. Salvador Torres is Jesse Deleon, Sr.'s step-father. Agent Travis' incident report concerning TABC Staff's subterfuge investigation was admitted into evidence in support of TABC Staff's allegations (See TABC Exhibit 8).

B. Respondent's Evidence.

Respondent testified that the champagne Agent Travis saw on January 1, 2003, at the licensed premises had been purchased from another retail dealer, Magic Liquors; however, the champagne had been a part of his licensed premises' New Years Eve celebration, which include a complimentary buffet with finger foods and champagne. According to Respondent, the champagne was not purchased with the intent that it would be resold at his licensed premises.

Respondent acknowledged receiving TABC Staff's request for documents. According to Respondent, he thought that he had complied with the request since he had given Agent Travis all the information that he had at their meeting. He also admitted that he did not disclose employment at Double J's Bar because he was not employed there. Respondent said that Double J's was owned by his nephew, Jesse Deleon, Jr., and he been a frequent customer there. He said that he had helped

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out occasionally, perhaps three times, as a D.J. playing music at Double J's when the regular D.J. was not available.

In reference to his alleged failure to disclose persons living within his household, Respondent said that at the time he completed his application, he did not consider his brother and sister-in-law, Joe and Glenda Deleon, as a part of the household. They were maintaining their own home, but temporarily stayed at Respondent's house to help with providing care for Respondent's father, who was terminally ill. According to Respondent, the only persons permanently residing within his household during 2001 were his father, Salvador, and himself. After his father died, Joe and Glenda returned to their home. Respondent testified the neither Joe nor Glenda had ever held a TABC-issued license, nor did either of them have a criminal history. He further said that he had never harbored any intention to deceive or be dishonest with TABC Staff, but that he could have been mistaken about dates he provided to TABC Staff, which are contained in TABC Staff's Exhibit 5.

Glenda Deleon testified that she is married to Respondent's brother, Joe. She stated that she and Joe had never owned a licensed premises or had any type of criminal history. According to Ms. Deleon, she and her husband began staying at Respondent's home in January 2002, to care for her father-in-law after he had been diagnosed with cancer in November 2001. Ms. Deleon said that Respondent's licensed premises had already opened when she and Joe began staying at Respondent's home. She did acknowledged that she currently resided at Respondent's home, and was there on the day (February 11, 2003) that Agent Travis came by to deliver papers to Respondent. Ms. Deleon agreed that she had accepted the letter from TABC Staff for Respondent on that day.

III. ANALYSIS

A. Resale of Alcoholic Beverage from Unauthorized Source.

It is undisputed that alcoholic beverages, several bottles of champagne, was purchased from another retailer, Magic Liquors, and kept behind the bar at Respondent's licensed premises on

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January 1, 2003. However, the TABC Staff's evidence concerning this alleged violation did not establish that Respondent, or Respondent's employee or agent, acquired the champagne for resale to Respondent's patrons that evening. No sales of champagne were observed by Agent Travis by Respondent or his agents or employees. If that activity been ongoing, the ALJ believes that Agent Travis would have observed these sales and testified accordingly.

Respondent's testified that the champagne, along with a food buffet, was a part of the New Year's Celebration at the licensed premises. Further, Respondent's explanation that the champagne and food were being served on a complimentary basis, without charge to his customers was credible. Based upon these factors, the ALJ finds that TABC Staff's evidence was insufficient to support the violation that Respondent acquired alcoholic beverage for the purpose of resale from another retail dealer.

B. Failure to Provide Business Records at the Request of TABC Staff.

It is undisputed that TABC Agent Travis made a request for production of documents relating to Respondent's licensed premises on February 11, 2003. This request for documents was delivered to Respondent's home by Agent Travis and accepted there by Glenda Deleon. The request was extensive and required production of the information on or before February 21, 2003. On February 21, 2003, Respondent met with Agent Travis and provided several of the requested items to her. These items included utility bills bearing Respondent's name, invoices for beer purchases, Respondent's W-2 for 2002, and copies of money orders paid to the State Comptroller for sales taxes paid for the 2nd and 4th quarters of 2002.

Numerous other requested documents were not produced by Respondent. In particular, Agent Travis said that Respondent did not provide her with copies of his 2002 income tax return, any bank records or business records such as ledgers, spreadsheets, cash register tapes, or payroll records for employees, and the lease for the licensed premises location. According to Agent Travis, these items would contain information that would be useful in TABC Staff's investigation of a

subterfuge complaint that TABC Staff had received in connection with Respondent's business.

While TABC Staff has the authority to require filing reports relating to the operation of any licensed premises pursuant to Section 5.32 of the Code; nevertheless, the ALJ finds that a license- or permit-holder is not impressed with the obligation to manufacture records that are not otherwise in existence or required to exist. To illustrate this point, 2002 individual tax returns were not required to be filed by any taxpayer until April 15, 2003. To expect that Respondent produce something that was not required to exist is an unreasonable interpretation of the above-listed Code provision. Further, the ALJ is not aware of any laundry list of records, such as requested from Respondent by TABC Staff in this case, that TABC licensees or permittees are required to maintain. While many of the items requested by TABC Staff may be considered as likely to be kept or maintained in the normal course of any business, however, the ALJ is not aware of any Code provision or TABC regulation that requires a licensee or permittee to be a good record-keeper.

Further, Respondent testified that after he left from his meeting with Agent Travis on February 21, 2003, it was his understanding that he had fulfilled TABC Staff's request for information because he had provided all of the records in his possession. The ALJ finds this to be a reasonable expectation Respondent's part. Had TABC Staff considered Respondent's failure to provide certain records essential to its subterfuge investigation in 2003, and a Code violation, it seems incongruous to the ALJ that TABC Staff was have postponed enforcement activity until 2005. Accordingly, the ALJ finds that TABC Staff failed to meet its burden of proof in relation to its allegation that Respondent did not provided TABC Staff with business records when they were requested.

C. False Statements or Misrepresentations in Respondent's Application.

TABC Staff alleges that Respondent made false statements or misrepresentations on his Personal History Sheet, which was a part of his initial permit and license application for this licensed premises and filed with TABC Staff in October 2001. TABC Staff complains that Respondent failed

to disclose his employment at another licensed premises, Double J's, and that he failed to disclose all members of his household to TABC Staff.

The first issue examined concerns whether Respondent failed to properly disclosed employment at Double J's, another TABC-licensed premises. The evidence in this case established that Double J's was owned and operated by Respondent's relatives, Jesse Deleon, Jr., (Respondent's nephew) and Rosa Deleon (Jesse Jr.'s mother and Respondent's sister-in-law). Respondent admitted being a frequent patron at Double J's. Consequently, Agent Travis would have likely seen him at that licensed premises on occasion. Respondent also acknowledged helping out at Double J's two or three times, filling in as a D.J. in the absence of the regular D.J. Respondent said, however, that he was never paid for this activity. Nevertheless, TABC Staff contends that Respondent was employed at Double J's, and said employment was not disclosed on Respondent's Personal History Sheet.⁶

Central to determining whether Respondent made a false statement or a misrepresentation concerning his activities at Double J's, is defining the term "employment." The ALJ finds that the term "employment," as viewed in the common course of everyday experience, would include compensation for the work provided by the employee to the employer. In this case, Respondent was not an employee⁷ of Double J's. Respondent merely assisted his family member on a very limited basis on a few occasions when Double J's regular D.J. was not available. Respondent received no compensation for this activity; therefore, the ALJ finds that Respondent's activities at Double J's was not employment, and thus, was not the sort of information that would require disclosure on a

⁶ Question 10 on Respondent's Personal History Sheet reads as follows:

State *employment* for past three (3) years, beginning with your present employment. You must also indicated periods of unemployment and retirement, including dates. If not employed outside your home, please indicated such. For retirement, please include name of company from which you retired. (Emphasis added.)

Respondent disclosed his employment at Brougham Seating and the City of Haltom City.

⁷ "Employee" is defined as a person who works for another in return for financial or other compensation. The American Heritage Dictionary, Second Edition.

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TABC application's Personal History Sheet. As a result, Respondent did not make a false statement or misrepresentation when he completed the information requested in response to Question 10 on his Personal History Sheet.

Finally, the ALJ examines TABC Staff's allegation that Respondent made a false statement or misrepresentation on Question 3 of his Personal History Sheet concerning individuals "residentially domiciled"⁸ with him. Respondent's answer to Question 3 was that Salvador Torres resided with him. TABC Staff contends that Respondent failed to disclose that his brother and sister-in-law, Joe and Glenda Deleon, were residing in his home on the effective date of Respondent's application, December 20, 2001 (the date Respondent's Personal History Sheet was notarized).

Agent Travis encountered Glenda Deleon at Respondent's home when she left TABC Staff's records production request with Ms. Deleon on February 11, 2003. During their conversation, Ms. Deleon told Agent Travis that she and her husband had lived at Respondent's residence for approximately 15 months in order to care of Salvador Torres, who had been diagnosed with terminal cancer.

Salvador Torres' diagnosis occurred very close in time to the date Respondent filed his application with TABC Staff for his permit and license. Respondent testified that he could not actually recall when his brother and sister-in-law had come to stay at his residence in order to help care for his father. Respondent's testimony was credible. It is reasonable, in the ALJ's opinion, that given the stress of receiving such news about a loved-one, that one's memory for specific dates might not be as sharp as it might otherwise be. Both Respondent and Mrs. Deleon further testified that initially there had been no intention that Joe and Glenda's stay at Respondent's home would be permanent given that they owned their own home. Ms. Deleon also testified that Respondent's licensed premises was already in operation when she came to care for Respondent's father in

⁸ "Domicile" means to reside at a given location and "reside" means to live in a place for an extended or *permanent* period of time. The American Heritage Dictionary, Second Edition. (Emphasis added.)

Respondent's home. Accordingly, the ALJ finds that TABC Staff's evidence is insufficient to show that Respondent made a false statement or misrepresentation in his Personal History Sheet in relation to persons residing in his home.

IV. RECOMMENDATION

The ALJ recommends that no enforcement action be taken against Respondent's permit or license.

V. FINDINGS OF FACT

1. Ricky Torres d/b/a Tejano Boom Night Club (Respondent) holds a Wine and Beer Retailer's Permit, BG-509016 and a Retail Dealer's On-Premises Late Hours License, BL-509017, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 3510 N. Grove Street, Fort Worth, Tarrant County, Texas.
2. On January 1, 2003, TABC Agent Tana Travis made an inspection of Respondent's premises described in Finding of Fact No. 1, and observed several bottles of champagne behind the bar with retail price stickers from another retail dealer, Magic Liquor.
3. The alcoholic beverage referred in Finding of Fact No. 2. was not possessed for resale by Respondent or Respondent's servants, agents or employees.
4. The champagne, which was referred to in Findings of Fact Nos. 2 and 3, was provided to Respondent's customers on a complimentary basis along with a food buffet as a part of a New Year's Eve celebration at Respondent's licensed premises.
5. On February 11, 2003, TABC Staff made a request for production of records from Respondent.
6. On February 21, 2003, Respondent provided Agent Travis with the requested records that existed and were in his possession at that time. These records included Respondent's W-2 form, utility bills for the licensed premises, invoices for products associated with the operation of the licensed premises, and sales tax reports for the 2nd and 4th quarters of 2002.
7. TABC Staff made no further demands for production of records or documents after Agent Travis and Respondent met to go over records supplied to TABC Staff by Respondent. At that meeting, Respondent provided explanations concerning why certain documents were not produced; namely, Respondent said that he did not possess items requested, and in some

- instances, the requested did not exist . Respondent left the meeting believing he had sufficiently complied with TABC Staff's request for production of documents and record.
8. Respondent was not employed at another TABC-licensed premises, Double J's Bar, in the three years prior to filing his application with TABC Staff for the permit and license referenced in Finding of Fact No. 1.
 9. Joe and Glenda Deleon were not residentially domiciled with Respondent at the time Respondent filed his application with TABC Staff for the permit and license referenced in Finding Fact No. 1.
 10. On October 5, 2005, TABC Staff issued a notice of hearing notifying all parties that a hearing would be held concerning this enforcement action and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
 11. A hearing in this matter was conducted on November 4, 2005, at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. Administrative Law Judge Tanya Cooper presided. TABC Staff was represented by TABC Staff Attorney, Timothy Griffith. Respondent appeared and was represented by Patricia Cole, attorney at law. The hearing concluded and the record closed on that day.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 25, 61, and 70.
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. 2 - 4, Respondent or his employee or agent did not acquire alcoholic beverage for the purpose of resale from another retail dealer in violation of TEX. ALCO. BEV. CODE ANN. §§ 1.04(6), 1.04(11), and 61.71(a)(20).
5. Based on the foregoing Findings of Fact Nos. 5 - 7, Respondent did not fail to reply to a request by TABC Staff to produce records on or before February 21, 2003 or since that time

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in violation of TEX. ALCO. BEV. CODE ANN. §§ 5.32, 11.61(b)(2), or 61.71(a)(1).

6. Based upon Findings of Fact Nos. 8 and 9, Respondent did not make a false statement or misrepresentation in his original application Personal History Sheet in violation of TEX. ALCO. BEV. CODE ANN. § 61.71(a)(4).
7. Based upon Findings of Fact Nos. 1 - 9 and Conclusions of Law Nos. 4 - 6, no enforcement action should be taken against Respondent's Wine and Beer Retailer's Permit, BG-509016, and Retail Dealer's On-Premises Late Hours License, BL-509017.

SIGNED December 21, 2005.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

6777 Camp Bowie Blvd.
Ft. Worth, Texas 76116
Phone (817) 731-1733
Fax (817) 377-3706

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION
CASE: RICKY TORRES D/B/A TEJANO BOOM NIGHT CLUB
DOCKET NUMBER: 458-06-0215
AGENCY CASE NO: 604091

Timothy Griffith
Staff Attorney
Texas Alcoholic Beverage Commission
Fax: 972/547-5093
Ph: 972/547-5092

AGENCY COUNSEL
BY FAX

Patricia Cole
Fax: 817/810-0569
Ph: 817/336-2400

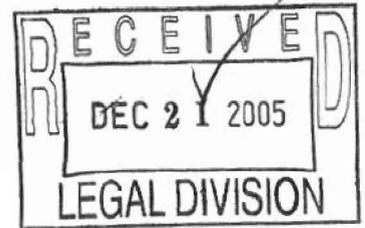
ATTORNEY FOR RESPONDENT
BY FAX

As of December 21, 2005

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



December 21, 2005

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

**RE: Docket No. 458-06-0215; Texas Alcoholic Beverage Commission vs Ricky Torres
d/b/a Tejano Boom Night Club(TABC Case No. 604091)**

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 Patricia Cole, Attorney for the Respondent. The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Ricky Torres d/b/a Tejano Boom Night Club (Respondent), alleging four violations of the Texas Alcoholic Beverage Code (the Code). In TABC Staff's notice of hearing, it alleged that on or before January 1, 2003, Respondent's agent or employee, Rosa Deleon, or some other person, acquired an alcoholic beverage for the purpose of resale from another retail dealer. Second, TABC Staff alleged that Respondent failed to supply records concerning his licensed premises' operations to TABC Agent Tana Travis on or before February 21, 2003. Third, TABC Staff alleges that on or about December 20, 2001, Respondent made a false statement or a misrepresentation in an original or renewal application by his failure to disclose that he had been previously employed by Double J's Bar, another licensed premises. Lastly, it is alleged that Respondent made another false statement or misrepresentation by failing to state that Glenda Deleon resided in Respondent's household. TABC Staff sought cancellation of Respondent's permit and license in relation to these allegations.

The Administrative Law Judge (ALJ) finds the evidence was not sufficient to establish that Respondent's employee, Rosa Deleon, or any other person acquired alcoholic beverage from another retailer dealer for resale at Respondent's licensed premises. Further, TABC Staff did not establish that Respondent failed to provide records concerning the operation of his licensed premises or that he made false statements on his permit and license application. Accordingly, the ALJ recommends that no enforcement action be taken against Respondent's permit or license.

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

Patricia Cole, Attorney for Respondent, VIA FACSIMILE 817/336-2181
Timothy Griffith, TABC Staff Attorney, VIA FACSIMILE 972/547-5093

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

January 12, 2006



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

**RE: Docket No. 458-06-0215; Texas Alcoholic Beverage Commission vs. Ricky Torres
d/b/a Tejano Boom Night Club (TABC Case No. 604091)**

Dear Mr. Steen:

I have received Exceptions to the Proposal for Decision (PFD) issued in this matter from TABC Staff. Respondent filed a Response to TABC Staff's Exceptions. Having reviewed both, I believe that each document presents points that should be considered favorably. TABC Staff did not file exceptions in relation to my findings, conclusions, and recommendation concerning Respondent's alleged violation involving possession of alcoholic beverage from an unauthorized source for resale. Therefore, I will address only the alleged violations specifically excepted to by TABC Staff as follows: Respondent making false or misleading statements on his permit and license application and Respondent's failure to produce records when requested by TABC Staff.

Over the course of the hearing, it became clear that TABC Staff was concerned about Respondent being involved in a subterfuge with some of his family members in connection to the operation of the licensed premises, Tejano Boom Night Club. TABC Staff apparently was unable to compile sufficient evidence to support that belief since a subterfuge violation was not alleged in this enforcement action. Consequently, TABC Staff resorted to asserting alternative violations in an attempt to secure cancellation of Respondent's permit and license.

TABC Staff alleged there were two instances in which Respondent made false or misleading statements in his application. Respondent's application was sworn to on December 21, 2001. These alleged false statements or misrepresentations dealt with Respondent failing to disclose employment at another licensed premises and failing to disclose all members of his household in response to Questions 3 and 10 on his personal history sheet. The greater weight of the evidence does not support TABC Staff's position concerning these allegations. To the contrary, the evidence presented supports that Respondent was not employed at his nephew's TABC-licensed premises, Double J, and that no one, except Respondent's father, Salvador Torres, resided with Respondent at the time Respondent submitted his application to TABC Staff for the licensed premises, Tejano Boom Night Club.

Employment, as the term is commonly understood, generally involves financial or other compensation paid to an employee by an employer. While "other compensation" may not

6777 Camp Bowie Blvd., Suite 400 ♦ Fort Worth, Texas 76116

(817) 731-1733 Fax (817) 377-3706

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Exception Letter
SOAH Docket No. 458-06-0215

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necessarily result in payment of money (i.e. wages or salary), it would include something of a benefit or value (e.g. an exchange of goods for services). There was no evidence that Respondent was compensated in any manner for helping out his nephew on a couple of occasions when his nephew's disc jockey was unavailable to perform this task at the licensed premises, Double J. Accordingly, I found that Respondent's answer to this question on his application was not false, nor did Respondent intend to mislead TABC Staff in any fashion concerning his employment history.

Further, Glenda Deleon's testimony at the hearing was credible that Respondent's permit and license for Tejano Boom Night Club had already been issued by TABC Staff when she began caring for Salvador Torres in Respondent's home. Ms. Deleon acknowledged that she, as well as her husband, stayed at Respondent's home at times during Mr. Torres' last illness. Ms. Deleon and Respondent both testified that Ms. Deleon and her husband had continued to maintain their own home and did not reside with Respondent at the time he completed his application. The onset of Mr. Torres' last illness, documented in evidence from Mr. Torres' physicians, supported the testimony that Ms. Deleon and her husband were not residing in Respondent's home at the time his application was completed and submitted to TABC Staff. As a result, I found that Respondent's disclosure of Salvador Torres as the only person residentially domiciled with him was not false or made with the intent to mislead TABC Staff.

Based upon the explanations provided above, TABC Staff's evidence is insufficient to establish that Respondent made false or misleading statements on his application. Accordingly, I do not wish to change or amend my initial proposed findings or conclusions concerning allegations made against Respondent that false or misleading statements were made in his permit and license application. I continue to recommend that no enforcement action be taken against Respondent in relation to these allegations.

TABC Staff's ability to examine a permit- or license-holder's business records is often an important part of a subterfuge investigation. In this instance, the Respondent was served with a request for a voluminous number of items. The evidence showed that Respondent delivered some of the requested records (utility bills for the licensed premises, beer invoices, money orders to the State Comptroller for fees associated with the licensed premises' operation, and 2002 W2 forms from Respondent's employer) on or before February 21, 2003. Respondent then met with TABC Agent T. Travis to go over the records produced. During their meeting, Agent Travis questioned Respondent about the lack of any bank records being provided to her since Respondent listed a bank account on his sworn application. Respondent told Agent Travis that the bank account listed on the application was a personal account, and that he had provided all records pertaining to the licensed premises that were in existence at that time. Respondent did not produce any bank records at the time of TABC Staff's request, and has not provided any of these records for examination to date.

TABC Staff's request for production specifically asked for "All bank statements pertaining to accounts (business or personal) to which you or your accountant are a party, in which transactions are conducted on behalf of the licensed establishment known as Tejano Boom Night Club." TABC Staff's request for inspection of these records was made within an appropriate time period that

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documentation concerning this bank account still should have been in existence and made available to TABC Staff pursuant to its production request. (See TEX. ALCO. BEV. CODE ANN. §§ 5.31, 5.32, and 5.33 and 16 TEX. ADMIN. CODE § 41.50)

In reviewing the TABC Standard Penal Chart, there are suggested penalties for a variety of record keeping violations that range from a warning to cancellation of a permit or license issued by TABC (See 16 TEX. ADMIN. CODE § 37.60(a)). Respondent's licensing history reveals one prior violation, possession of a distilled spirit on the licensed premises by an employee on December 31, 2003. Both violations (distilled spirits possession and failure to produce records) are classified as major regulatory infractions and occurred within 24 months of each other. 16 TEX. ADMIN. CODE § 37.60(c). As a result, I recommend that Respondent's permit and license be suspended for five days. Further, pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64(a), Respondent may pay a civil penalty in lieu of any suspension in the amount of \$750. Accordingly, Finding of Fact No. 7 and Conclusions of Law Nos. 5 and 7, contained in my PFD dated December 21, 2005, should be and are amended to read as follows:

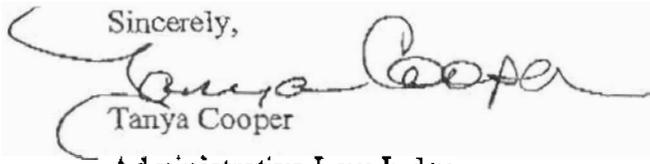
Finding of Fact No. 7. On February 23, 2003, Respondent failed to provide TABC Staff with bank statements associated with a bank account that was listed on Respondent's permit and license application dated December 21, 2001; and further Respondent has not produced any of these statements to date.

* * *

Conclusion of Law No. 5. Based on Findings of Fact Nos. 5 and 7, Respondent failed to produce records, namely bank account statements from a bank account previously listed on Respondent's permit and license application, as requested by TABC Staff in violation of TEX. ALCO. BEV. CODE ANN. §§ 5.31, 5.32, 5.33, 11.61(b)(2), and 61.71(a)(1), and 16 TEX. ADMIN. CODE § 41.50(b).

Conclusion of Law No. 7. Based on Findings of Fact Nos. 5 and 7 and Conclusion of Law No. 5, Respondent's Wine and Beer Retailer's Permit, BG-509016, and Retail Dealer's On-Premises Late Hours License, BL-509017, should be suspended for five days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$750. TEX. ALCO. BEV. CODE ANN. § 11.64(a) and 16 TEX. ADMIN. CODE § 37.60.

Sincerely,



Tanya Cooper

Administrative Law Judge

TC/ds

Patricia Cole, Attorney for Respondent, VIA FACSIMILE 817/336-2181

Timothy Griffith, TABC Staff Attorney, VIA FACSIMILE 972/547-5093

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6777 Camp Bowie Blvd.
Ft. Worth, Texas 76116
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Fax (817) 377-3706

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CASE: RICKY TORRES D/B/A TEJANO BOOM NIGHT CLUB
DOCKET NUMBER: 458-06-0215
AGENCY CASE NO: 604091

Timothy Griffith
Staff Attorney
Texas Alcoholic Beverage Commission
Fax: 972/547-5093
Ph: 972/547-5092

AGENCY COUNSEL
BY FAX

Patricia Cole
Fax: 817/810-0569
Ph: 817/336-2400

ATTORNEY FOR RESPONDENT
BY FAX

As of January 12, 2006