

DOCKET NO. 606173

IN RE CUTTER'S CLUB & GRILL	§	BEFORE THE
D/B/A CUTTER'S CLUB & GRILL	§	
PERMIT/LICENSE NOS. N-483906,	§	
NL483907, PE483908	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-2988)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 28th day of March, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on January 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 March 4, 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.

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 CANCELLED**.

This Order will become final and enforceable on April 18, 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 28th day of March, 2005, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

Cutter's Club & Grill
RESPONDENT
4355 IH 30
Mesquite, TX 75150-2035
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1930 1579

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-05-2988

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
CUTTER'S CLUB & GRILL,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) sought cancellation of the permits held by Cutter's Club & Grill (Respondent), alleging that (1) Respondent knowingly possessed uninvoiced alcoholic beverages on the licensed premises and (2) Respondent failed to reply to Petitioner's records request pertaining to the possession of alcoholic beverages on the premises. The Administrative Law Judge (ALJ) recommends that Respondent's permits be canceled.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61 and 28.06, as well as 16 TEX. ADMIN. CODE (TAC) § 41.50 of the TABC Rules (the Rules). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On January 4, 2005, a hearing convened in Dallas, Texas, before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Petitioner was represented at the hearing by Timothy Griffith, Staff Attorney. Respondent appeared *pro se*. After presentation of evidence and argument, the hearing concluded and the record closed on that date.



SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 2

II. DISCUSSION AND ANALYSIS

A. Background

Respondent's licensed premises (hereafter referred to as Cutter's) are located at 4104 West Camp Wisdom Road, Suite 225 and 231, Dallas, Dallas County, Texas. Respondent holds private club registration permit N-483906, private club late hours permit NL-483907, and beverage cartage permit PE-483908, issued by the TABC on November 22, 2000. The permits have been continuously renewed.

B. Applicable Law

Pursuant to the Code, Petitioner may require the filing of reports and other data by persons engaged in the alcoholic beverage business.¹ Petitioner may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or the Rules.² No permittee may possess or permit to be possessed on the licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.³ No permittee may knowingly [emphasis added] possess or permit to be possessed on the licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.⁴

The law requires the Commission or administrator to cancel [emphasis added] the permit of any permittee found by the Commission or administrator, after notice and hearing, to have violated or to have been convicted of violating § 28.06 (c) of the Code.⁵

1 § 5.32 of the Code.

2 § 11.61(b)(2) of the Code.

3 § 28.06(a) of the Code.

4 § 28.06(c) of the Code.

5 § 28.06(d) of the Code.

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 3

Invoice is defined as an instrument issued by the seller of the alcoholic beverages to a permittee.⁶ An invoice shall be issued in original and one copy in consecutive numbered order, showing the date of the sale or distribution, the purchaser and his address, the quantity, brand and class of alcoholic beverages sold and the total price of each brand and class shown thereon. Such invoice or a copy thereof shall be delivered to the permittee and a copy of such invoice shall be kept by the seller making the same.⁷

C. Petitioner's Evidence and Contentions

Petitioner contends that Respondent has operated its premises in violation of the Code and the Rules. Pursuant § 28.06(c) of the Code and § 41.50 of the Rules, which makes the violation applicable to private clubs, the most serious violation of knowingly possessing uninvoiced alcoholic beverages on the premises requires the cancellation of Respondent's permits.

1. Testimony of Agent David Welsh

Agent David Welsh has been a TABC agent for three years and is knowledgeable about the requirements of the Code and the Rules applicable to the permits held by Respondent. The Code and the Rules require the permittee to purchase alcoholic beverages from the supplier.⁸ The permittee is only authorized to have alcoholic beverages on its premises which are specifically purchased by and invoiced to the permittee under the permittee's permit number. The permittee is then required by law to maintain the invoices on the premises.

⁶ § 41.50(a)(2) of the Rules.

⁷ § 41.50(h)(1) of the Rules.

⁸ A permittee shall not possess or permit to be possessed on his licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased by the permittee. Each invoice shall be kept on the licensed premises for a period of two years and shall be made available to a representative of the commission upon reasonable request. § 41.50(h)(2) of the Rules.

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 4

a. **Knowing possession of uninvoiced alcoholic beverages**

Agent Welsh conducted an inspection of Respondent's licensed premises on May 31, 2003. He was escorted by Respondent's manager, Russell Steel, to the office in an attempt to locate invoices for alcoholic beverages on the premises. Mr. Steel stated that he did not know where the invoices would be located. During the search of the office, Agent Welsh was unable to find any 2003 invoices for Respondent. He did, however, find 2003 invoices for another private club, Cocina Caliente, located in Denton, Texas.

Agent Welsh returned to Respondent's premises on June 5, 2003, to write down the stamp numbers from the liquor bottles observed on the premises in an attempt to determine where the liquor had come from. According to Agent Welsh, the stamp numbers on a large quantity of the bottles indicated that they were invoiced to Cocina Caliente. He was able to verify approximately 33 of the stamps as belonging to Cocina Caliente. Other liquor bottles were not invoiced to Respondent and he was unable to determine by whom the liquor was actually purchased. Agent Welsh returned to Respondent's premises on June 7, 2003, and seized the liquor. He prepared a stamp inventory of the liquor seized from Respondent's premises⁹ and also photographed the items.¹⁰

According to Agent Welsh, he believes that Respondent possessed liquor sold to Cocina Caliente because Respondent was on cash law and credit law suspension for failure to pay its creditors. Therefore, Respondent was not authorized to purchase alcoholic beverages in its own name. An ownership connection exists between Respondent and Cocina Caliente, in that Respondent's president, Raymond Cosme, is also the secretary of Cocina Caliente.

Agent Welsh stated, in his opinion, Respondent knowingly possessed the uninvoiced alcoholic

9 TABC Exhibit One, Cutter's Stamp Inventory.

10 TABC Exhibit Two, photographs of seized liquor.

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 5

beverages found on the premises. The quantity and location of the alcoholic beverages seized from the premises were such that Respondent should have known that they were there. The alcoholic beverages were openly displayed and stocked at the bar for immediate sale to members of Cutter's. Some of the alcoholic beverages were purchased under the permit of Cocina Caliente. According to Agent Welsh, the invoices that he found were signed by employees of Respondent when they picked up the alcoholic beverages. He also contacted the seller of the alcoholic beverages, Bob's Liquor. The person who takes telephone orders at Bob's Liquor stated specifically that Raymond Cosme is the only person authorized to order alcoholic beverages from them on behalf of Respondent and the only one who has ever ordered the alcoholic beverages.

b. Failure to respond to TABC records request

On June 4, 2003, Agent Welsh prepared a letter directed to Respondent.¹¹ In the letter, the agent specifically requested copies of all alcoholic beverage invoices for the last three months for Respondent's licensed premises location. The letter instructed Respondent to forward the documents no later than June 23, 2003. At Agent Welsh's request and direction, Agent Mark White hand-delivered the letter to Mr. Steel on June 6, 2003. Upon inquiry by Agent Welsh on June 7, 2003, Mr. Steel confirmed receipt of the letter the previous day. According to Agent Welsh, he never received any records from Respondent.

D. Respondent's Evidence and Contentions

Richard Cosme testified at the hearing on behalf of Respondent. Mr. Cosme stated that he did recall receiving the records request, calling Mr. Welsh and working on getting the requested documents together. However, another TABC representative, Don Hines, subsequently informed him that he had a \$900 fine to pay. According to Mr. Cosme, he paid the fine believing that the money also covered the records situation. He now realizes that he was wrong in that belief, but had no bad intentions.

¹¹ TABC Exhibit Three, records request to Cutter's.

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 6

Mr. Cosme also stated that he does own another club. However, he only purchases the liquor, he does not deliver it. The liquor is delivered by another source. He added that he was sorry if there was a mix-up with the delivery or in how the liquor was purchased. Lastly, he acknowledged that he understands that the whole situation was wrong. Nonetheless, he requests leniency in the matter. He would like the opportunity to make amends for the situation, put it behind him, and be permitted to continue operating.

E. Analysis

The issues in this case are clear. After considering the evidence, the ALJ concludes that Petitioner has met its burden and proved that Respondent committed the violations of the Code and the Rules as alleged by Petitioner. Mr. Cosme's explanations, even if true, do not legally excuse or justify the violations. The fact that he owns the two private clubs and serves in the capacity of officer to each makes his lack of knowledge claim ("I don't deliver the liquor, I just order it") less plausible with regard to how the uninvoiced alcoholic beverages and the alcoholic beverages invoiced to Cocina Caliente came to be possessed by Cutter's.

It appears from Respondent's violations history¹² that Respondent was previously issued a warning for the possession of uninvoiced alcoholic beverages on the licensed premises, in violation of § 28.06(a) of the Code. The violation date was March 15, 2002. The ALJ finds that Respondent knew, or should have known, that the alcoholic beverages seized on June 7, 2003, were stored and sold on Respondent's licensed premises in violation of the Code and the Rules.

III. Recommendation

Petitioner requested that Respondent's permits be canceled. A permittee's knowing possession

¹² TABC Exhibit Six, certified copy of Respondent's permits and violations history.

SOAH DOCKET NO. 458-05-2989

PROPOSAL FOR DECISION

PAGE 7

of uninvoiced alcoholic beverages on the licensed premises in violation of § 28.06(c) of the Code is a major regulatory violation. Pursuant to § 28.06(d) of the Code, cancellation is the remedy or sanction for this violation. The ALJ has no authority to recommend a more lenient sanction, and therefore, recommends that Respondent's permits be canceled.

IV. FINDINGS OF FACT

1. Respondent's licensed premises (hereafter referred to as Cutter's) are located at 4107 West Camp Wisdom Road, Suite 225 and 231, Dallas, Dallas County, Texas.
2. Respondent holds private club registration permit N-483906, private club late hours permit NL-483907, and beverage cartage permit PE-483908, issued by the TABC on November 22, 2000.
3. On May 31, 2003, TABC Agent David Welsh conducted an inspection of Respondent's licensed premises.
4. Agent Welsh attempted to locate invoices for alcoholic beverages openly displayed and stored at the bar for immediate sale to Respondent's members.
5. Agent Welsh was unable to locate any 2003 invoices for Respondent.
6. On June 4, 2003, Agent Welsh prepared a letter directed to Respondent and requesting, among other documents, copies of all alcoholic beverage invoices for the past three months for Respondent's licensed premises. Respondent's response was due on or by June 27, 2003.
7. On June 5, 2003, Agent Welsh recorded the stamp numbers from the alcoholic beverages observed on Respondent's premises.
8. A large quantity of the alcoholic beverages were sold by Bob's Liquor and invoiced to Cocina Caliente, a private club located in Denton, Texas.
9. Other alcoholic beverages were not invoiced to Respondent and Agent Welsh was unable to determine by whom the alcoholic beverages were actually purchased.
10. On June 6, 2003, the TABC records request was hand-delivered to Respondent's manager, Russell Steel.
11. Respondent acknowledged receipt of the TABC records request.

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 8

12. Respondent never responded to the request.
13. On June 7, 2003, Agent Welsh seized, inventoried and photographed the alcoholic beverages shown not to have been invoiced to Respondent.
14. Common ownership exists between Cocina Caliente and Respondent.
15. Raymond Cosme is the secretary of Cocina Caliente and also the president of Cutter's.
16. During the time that the alcoholic beverages invoiced to Cocina Caliente were purchased, Respondent was not authorized to purchase alcoholic beverages under its permit due to a cash law and credit law suspension.
17. Mr. Cosme was the only person at Cutter's authorized to order alcoholic beverages from Bob's Liquor.
18. The invoices for the alcoholic beverages invoiced to Cocina Caliente contained the signatures of Respondent's employees.
19. On or about June 15, 2002, TABC issued a warning to Respondent for the possession of uninvoiced alcoholic beverages on the premises.
20. Respondent knew or should have known that the uninvoiced alcoholic beverages and the alcoholic beverages invoiced to Cocina Caliente were openly displayed, stored and sold to Respondent's members on Respondent's licensed premises.
21. On December 17, 2004, Petitioner issued a notice of hearing notifying Respondent that a hearing would be held concerning Petitioner's allegations and informing Respondent of the time, place, and nature of the hearing and 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.
22. The hearing was held on January 4, 2005, in Dallas, Dallas County, Texas, before Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Commission Staff appeared and was represented by Timothy Griffith, Staff Attorney. Respondent appeared *pro se*. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 and §§ 6.01, 11.61 and 28.06 of the Code, as well as 16 TEX. ADMIN. CODE (TAC) § 41.50 of the TABC Rules (the Rules).

SOAH DOCKET NO. 458-05-2988

PROPOSAL FOR DECISION

PAGE 9

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. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent failed to respond to TABC's request for records, in violation of § 5.32 of the Code and § 41.50(h)(2) of the Rules.
5. Respondent knowingly possessed or permitted to possess on the licensed premises any alcoholic beverage which was not covered by an invoice from the supplier from whom the alcoholic beverage was purchased, in violation of § 28.06(c) and § 41.50(a)(3) of the Rules.
6. Respondent's permits should be canceled pursuant to § 28.06(d) of the Code.

SIGNED March 4, 2005.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS