

DOCKET NO. 612064

9-16-05 ✓  
CG +

IN RE ERNESTO BAZAN, JR.	§	BEFORE THE
D/B/A CAESAR'S CABARET	§	
PERMIT/LICENSE NOS. MB491324,	§	
LB491325	§	TEXAS ALCOHOLIC
	§	
WICHITA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-6352)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 15th day of September, 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 July 8, 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 August 22, 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 and/or licenses be **CANCELLED FOR CAUSE**.

**This Order will become final and enforceable on October 6, 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** this 15th day of September, 2005

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

CG/bc

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

Bruce Harris  
**ATTORNEY FOR RESPONDENT**  
**VIA FAX (940) 322-2453**

Ernesto Bazan, Jr.  
d/b/a Caesar's Cabaret  
**RESPONDENT**  
411 N. Scott  
Wichita Falls, TX 76306  
**VIA CM/RRR NO. 7005 0390 0005 7550 3276**

Christopher Gee  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Lubbock District Office



Respondent's employees knowingly possessed distilled spirits on the licensed premises that were not properly invoiced and did not have local distributor tax stamps affixed to the distilled spirits bottles. The ALJ further agrees with TABC Staff that Respondent's permits should be cancelled for cause.

## 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 July 8, 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 Christopher G. Gee, TABC Staff Attorney. Respondent appeared and was represented by Bruce Harris, attorney at law. The hearing concluded on July 8, 2005; however, the parties requested that the ALJ leave the record open for filing additional documentary evidence and written arguments. The record closed on August 8, 2005.

## II. EVIDENCE

Respondent holds a Mixed Beverage Permit, MB491324, and a Mixed Beverage Late Hours Permit, LB491325, issued by TABC for Respondent's premises, Caesar's Cabaret, located at 411 N. Scott, Wichita Falls, Wichita County, Texas. Respondent's permits were initially issued on April 16, 2001, and have been continuously renewed since that date. Agent Taz Wallace, Melissa Castro, and Respondent testified at the hearing.

### A. TABC Staff's Evidence.

TABC Staff's Exhibit 1, containing Respondent's Permits and violation history, was

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admitted into evidence. Respondent's violation history lists several previous violations of the Code.<sup>2</sup> Respondent's permits have been suspended four times since May 2002 for various periods or Respondent has paid civil penalties in lieu of permit suspensions.

Agent Wallace testified that he has been employed as a TABC Staff investigator for 21 years. He stated that he is familiar with Respondent's licensed premises, having been there during several TABC Staff inspections. He is also knowledgeable concerning the Code and TABC rules regulating TABC licensees and permittees.

Agent Wallace explained that TABC-licensed mixed beverage permit holders are allowed to purchase liquor (distilled spirits) on credit, but only from a TABC-authorized supplier. In the event a permit holder fails to pay amounts owed to the supplier, the permit holder is required to be placed upon TABC Staff's "delinquent list" by the supplier. Agent Wallace said that it is a Code violation for a supplier to make any further liquor sales to any permit holder on the delinquent list. Agent Wallace testified that Respondent had been placed on the delinquent list since approximately August 23, 2003.

Agent Wallace stated that he had inspected Respondent's licensed premises a variety of times since Respondent had been placed on the delinquent list. On one occasion, he observed two pour spouts from large bottles (1.75 liter bottles) of distilled spirits on the ground near Respondent's trash dumpster. Agent Wallace said that the larger bottles were generally utilized by licensed premises with automated dispensing liquor systems (gun systems), which Respondent did not use at his premises. According to Agent Wallace, Respondent's bartenders utilized a "hand pour" or "free pour" system, which generally used smaller (.750 liters) bottles. Agent Wallace said that because the larger bottles are less expensive per serving, the cost saving is often an incentive for a bar

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<sup>2</sup> While Respondent's licensing history contains numerous entries, the more significant Code violations are as follows: two instances of Permitting Removal of Alcoholic Beverages from the Licensed Premises; two instances of Permitting a Minor (18 or over) to Possess/Consume Alcoholic Beverage on the Licensed Premises; a violation of Respondent Being Indebted to the State for Taxes or Fees; a Cash Law violation; and a Sale of an Alcoholic Beverage to an Intoxicated Person violation.

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operator to refill smaller bottles from the larger bottles despite it being unlawful to do so. In examining Respondent's stock of distilled spirits inside the business over several inspections, Agent Wallace noted that there was never a large quantity of distilled spirits on hand. These two factors caused Agent Wallace to suspect that Defendant was refilling the bar stock of liquor from outside or unauthorized sources, which would be a Code violation.

Based upon his suspicion, Agent Wallace said that he had marked liquor levels on various bottles on hand at Respondent's licensed premises. If at the time of reinspection the level of liquor in the marked bottles were higher than the marks previously placed on bottles, it would verify that refilling bottles was ongoing, according to Agent Wallace. However, Agent Wallace stated that, during subsequent inspections of Respondent's business, liquor levels in marked bottles had not risen. Nevertheless, Agent Wallace said that he continued to suspect the refilling was ongoing due to the small quantity of liquor Respondent had on hand in relation to the length of time he had been on the delinquent list.

On August 20, 2004, an inspection of Respondent's licensed premises was conducted by an undercover police officer. While on the premises, the officer purchased distilled spirits and observed other customers purchasing liquor as well.

Agent Wallace was at Respondent's licensed premises on August 27, 2004, to perform an inspection. While there, he observed a green car being driven by a female pull up to the business. Two males exited the vehicle and went inside the building. The car then pulled around the building and backed up to the building's back door. Agent Wallace said he saw the men come outside and begin unloading beer out of the car's trunk. Agent Wallace testified that he approached the group. At that point, Agent Wallace stated he saw there were bottles of liquor inside the vehicle in addition to the beer in the trunk.

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Agent Wallace said that there was a total of ten bottles of distilled spirits<sup>3</sup> in the vehicle. According to Agent Wallace, none of the bottles had the required tax stamps to show they were purchased from an authorized supplier; nor was there an invoice for the liquor, which was required for the liquor to lawfully be on Respondent's licensed premises.

Agent Wallace identified the individuals unloading the vehicle. They were Leo Bazan, Respondent's brother, Apolonio Barrenties, and Ljubica Joivic. All three people told Agent Wallace that they were employed at the licensed premises, with Mr. Bazan stating that he was the premises' manager.

When asked about the liquor bottles, Mr. Bazan told Agent Wallace they were his and were used for partying after the licensed premises was closed. Agent Wallace also asked Mr. Barrenties about the liquor found in the car. Mr. Barrenties said that the liquor was for refilling bottles used at Respondent's business, but said that he had never personally observed this activity.

Agent Wallace said that in his opinion, two Code provisions were violated at Respondent's premises on August 27, 2004. Due to these violations and Respondent's past history of violations, Agent Wallace stated that he believed Respondent's permits should be canceled.

During cross-examination, Agent Wallace said that it was lawful for Respondent to sell any remaining stock of distilled spirits that he owned at the time he was placed on the delinquent list; and in addition, it was permissible to sell a stock of liquor that Respondent had transferred to this premises from another of his licensed premises, Crosby's, after Crosby's had closed. However, Agent Wallace testified that it would be unlawful to refill any of the lawfully possessed bottles of distilled spirits.

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<sup>3</sup> The bottles observed by Agent Wallace on Respondent's licensed premises were confiscated and produced at the hearing for the ALJ's inspection. Bottles of tequila, vodka, gin, whiskey, and other liquors in various quantity levels were displayed.

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Agent Wallace said that no one had given him consent to look into the car where the bottles of liquor were found. He stated that since the vehicle was on the licensed premises (parked in Respondent's parking lot) and under the control of Respondent's employees, it was permissible for him to inspect it.

Agent Wallace ended his testimony discussing his conversation with Ms. Joivic on August 27, 2004. Ms. Joivic told Agent Wallace that the liquor belonged to her roommate, Melissa Castro. She went on to tell Agent Wallace that Ms. Castro had placed the liquor bottles in the car just before she left their apartment to drive the three of them (herself, Mr. Bazan and Mr. Barrenties) to work at Caesar's.

#### **B. Respondent's Evidence.**

Respondent testified that he was not present when the incident described by Agent Wallace occurred. According to Respondent, another licensed premises he owned, Crosby's, had closed in January 2004. In February 2004, Respondent transferred approximately 50 bottles of liquor from Crosby's to Caesar's Cabaret. At that time, Crosby's inventory of distilled spirits included full and partially full bottles.

Respondent acknowledged that Leo Bazan was his employee and the manager of Caesar's Cabaret on August 27, 2004. Respondent also said that Ms. Joivic was a waitress at the club, and at that time, she was sharing an apartment with his girlfriend, Ms. Castro.

Respondent said that liquor sales at Caesar's Cabaret amounted to approximately 40% of the business' total alcoholic beverage revenue, with the remaining 60% of sales attributed to beer. He testified that at the time this incident occurred, he was attempting to get himself removed from the delinquent list. Respondent stated that he had never seen anyone using unauthorized liquor on the premises, and would not have condoned that type of activity. Respondent said that he had always cooperated with TABC Staff; but if his permits for Caesar's Cabaret were canceled, his business

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would be forced to close. If that were the case, 10 to 15 employees would lose their jobs. He further stated that he had no other source of income other than from the operation of this licensed premises.

Melissa Castro testified that for two and one-half years she had been employed at Caesar's Cabaret and that she was Respondent's girlfriend. She further acknowledged that Ms. Joivic was her roommate on August 27, 2004. Ms. Castro said that Crosby's had a large liquor reserve since it had not been in business for very long when it closed and that only a few persons drank in Crosby's bar. She estimated that 50 bottles of various types of distilled spirits were transferred to Caesar's from Crosby's. According to Ms. Castro, no liquor was ever illegally transferred from one bottle to another.

Ms. Castro was not present at Caesar's on August 27, 2004, when the 10 bottles of liquor were seized by Agent Wallace. According to Ms. Castro, the bottles confiscated belonged to "us." She testified that "they" were not permitted to drink at the club, but that numerous people would come over to her apartment and drink after Caesar's closed at night. Ms. Castro initially said she did not know why the liquor was inside the vehicle at Caesar's because Caesar's liquor was stored inside the club, either at the bar, in the cooler, or in the licensed premises' office. Ms. Castro later acknowledged that she had put the liquor in the car on the night before (August 26, 2004), and that the liquor's presence in the vehicle on August 27, 2004, was an accident.

### III. ANALYSIS

Although there was a significant amount of testimony concerning whether Respondent was violating the Code by refilling liquor bottles, the issues to be determined in this proceeding are as follows:

1. Whether Respondent or his agent, servant, or employee possessed or permitted another to possess distilled spirits in a container not bearing a serially numbered

identification stamp<sup>4</sup> on the licensed premises;<sup>5</sup> and

2. Whether Respondent, his agent, or his employee knowingly possessed or permitted to be possessed any alcoholic beverage on the licensed premises which was not covered by an invoice from the supplier from whom the alcoholic beverage was purchased in violation of TEX. ALCO. BEV. CODE ANN. § 28.06(c).<sup>6</sup>

TABC Staff's evidence established that distilled spirits (tequila, gin, vodka, whisky, and other liquors) were present on the licensed premises and in the possession of Respondent's employees. The bottles containing these spirits did not bear any serial identification numbers affixed to the bottles. Agent Wallace recovered bottles of the above-described distilled spirits from a motor vehicle, which was driven and occupied by Respondent's employees, Ms. Joivic, Mr. Barrenties, and Respondent's brother, Leo Bazan. The vehicle was parked on the licensed premises' parking lot at the back door of Caesar's Cabaret when Agent Wallace initially observed two liquor bottles in plain view inside the car. At Agent Wallace's request, the remaining bottles were produced from inside backpacks in the vehicle. Upon inspection of the bottles, Agent Wallace found that no tax stamps (serial identification numbers) were affixed to the bottles. Agent Wallace produced the bottles he seized from Respondent's employees at the hearing, and none of the bottles viewed by the ALJ were marked with serial identification numbers affixed.

Further, when Agent Wallace asked Respondent's employees for a supplier's invoice to

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<sup>4</sup> A mixed beverage permittee may not possess or permit a person to possess on the premises distilled spirits in any container that does not bear a serially numbered identification stamp issued by the commission or other identification approved by the commission. Identification stamps may be issued only to a holder of a local distributor's permit who shall affix the stamps as prescribed by the commission or administrator. TEX. ALCO. BEV. CODE § 28.15(a) and (c).

<sup>5</sup> 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).

<sup>6</sup> A person who violates TEX. ALCO. BEV. CODE ANN. § 28.06(c) commits a misdemeanor punishable by a fine of not less than \$500 nor more than \$1,000 and by confinement in the county jail for not less than 30 days nor more than two years. *The commission or administrator shall cancel 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 Subsection (c) of this section. (Emphasis added.)*

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account for the bottles of distilled spirits, none could be produced. Respondent's employees told Agent Wallace that the distilled spirits in their possession did not belong to Respondent, but Agent Wallace was given conflicting information concerning who owned the liquor. Ms. Joivic said the liquor belonged to Ms. Castro, while Leo Bazan said it belonged to him.

The evidence produced by Respondent failed to negate that the Code violations occurred on Respondent's licensed premises on August 27, 2004. Neither Respondent nor Ms. Castro was present with Agent Wallace or Respondent's other employees when the bottles of liquor were found. While Ms. Castro attempted to take responsibility for placing the bottles of distilled spirits into the vehicle, she also was aware that Ms. Joivic, Mr. Barrenties, and Mr. Bazan were going to work at the licensed premises in the vehicle where the liquor was. As a result, she, as Respondent's employee, knowingly permitted Respondent's other employees to possess distilled spirits on Respondent's licensed premises.

In the ALJ's opinion, it is also more likely than not that Ms. Joivic, Mr. Barrenties, and Mr. Bazan were all aware of the distilled spirits' presence within the vehicle as they arrived for work at Respondent's licensed premises. The bottles containing the liquor were seen in plain view by Agent Wallace and other liquor bottles were readily produced from the vehicle by Respondent's employees when asked to do so by Agent Wallace. Further, statements to Agent Wallace by Ms. Joivic, Mr. Barrenties, and Mr. Bazan suggested that they were aware that the liquor was in their vehicle.

TABC Staff has requested cancellation of Respondent's permits for cause as a result of these violations, which is in keeping with penalty standards set forth in 16 TEX. ADMIN. CODE § 37.60. Having considered the factors discussed above and Respondent's licensing history, the ALJ agrees with TABC Staff that the requested penalty for this violation is appropriate.

#### IV. RECOMMENDATION

The ALJ recommends that Respondent's permits be cancelled for cause.

**V. PROPOSED FINDINGS OF FACT**

1. Ernesto Bazan, Jr. d/b/a Caesar's Cabaret (Respondent) holds a Mixed Beverage Permit, MB491324, and a Mixed Beverage Late Hours Permit, LB491325, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 411 N. Scott, Wichita Falls, Wichita County, Texas.
2. On August 27, 2004, Leo Bazan, Apolonio Barrenties, and Ljubica Joivic were employees at Respondent's licensed premises described in Finding of Fact No. 1.
3. On that day, Mr. Leo Bazan, Mr. Barrenties, and Ms. Joivic arrived for work in the same motor vehicle; and after Mr. Bazan and Mr. Barrenties exited the car, Ms. Joivic parked the vehicle on the licensed premises' parking lot near the back door of Respondent's building.
4. After Ms. Joivic parked the vehicle, Mr. Bazan and Mr. Barrenties began unloading beer from the vehicle's trunk and taking it inside the licensed premises.
5. TABC Agent Taz Wallace approached Mr. Bazan, Mr. Barrenties, and Ms. Joivic as they were unloading the vehicle, and while speaking with them Agent Wallace observed two bottles of distilled spirits inside the vehicle.
6. Agent Wallace requested to see these bottles and asked for any other bottles of distilled spirits inside the vehicle to be produced for his inspection.
7. Ten bottles of distilled spirits (tequila, gin, vodka, whiskey, and other types of liquors) were produced from the vehicle by Respondent's employees for Agent Wallace's inspection.
8. None of the bottles of distilled spirits, described in Finding of Fact No. 7, had serial identification numbers affixed to them by an authorized supplier.
9. Further, Respondent's employees were unable to produce an invoice from an authorized supplier from whom the alcoholic beverage was purchased for use at Respondent's licensed premises when requested by Agent Wallace.
10. Melissa Castro, Respondent's girlfriend and employee, as well as Ms. Joivic's roommate, placed the bottles of distilled spirits in the car before Ms. Joivic, Mr. Barrenties, and Mr. Bazan left for work at Respondent's licensed premises on August 27, 2004.
11. A hearing in this matter was conducted on July 8, 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, Christopher G. Gee. Respondent was represented by Bruce Harris, attorney. The hearing concluded on that date. The record closed on August 8, 2005.

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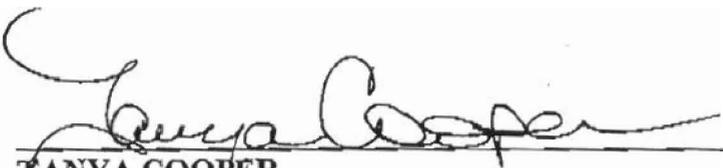
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**VI. PROPOSED CONCLUSIONS OF LAW**

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 28, and 29, §§ 6.01 and 11.61, 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.
3. Based upon Proposed Findings of Fact Nos. 1 - 8, Respondent's employees possessed distilled spirits in a container not bearing a serially numbered identification stamp on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 28.15(a).
4. Based upon Proposed Findings of Fact Nos. 1 - 10, Respondent's employees knowingly possessed or permitted the possession of alcoholic beverages not covered by an invoice from a supplier from whom the alcoholic beverages were purchased in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 28.06(c) and 28.06(d).
5. Based on the foregoing Findings of Fact Nos. 1 - 10 and Conclusions of Law Nos. 3 and 4, Respondent's Mixed Beverage Permit, MB491324, and Mixed Beverage Late Hours Permit, LB491325, issued by TABC should be cancelled for cause pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 28.06, and 28.15, and 16 TEX. ADMIN. CODE § 37.06.

SIGNED August 22, 2005.



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TANYA COOPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge



August 22, 2005

Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

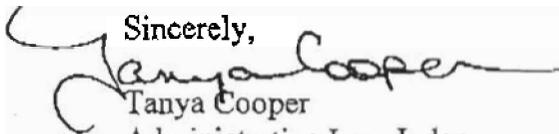
RE: Docket No. 458-05-6352; Texas Alcoholic Beverage Commission vs Ernesto Bazan, Jr. d/b/a Caesar's Cabaret (TABC Case No. 612064)

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 Christopher G. Gee, attorney for Texas Alcoholic Beverage Commission, and to Bruce Harris, Attorney for the Respondent. The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Ernesto Bazan, Jr. d/b/a Caesar's Cabaret (Respondent), alleging that Respondent or his employee possessed or permitted another to possess distilled spirits on the licensed premises in a container not bearing a serial numbered identification stamp on August 27, 2004. Further, TABC Staff alleged that Respondent or his employee knowingly possessed or permitted the possession of alcoholic beverages not covered by invoice on the licensed premises.

TABC Staff sought cancellation of Respondent's permits in relation to these allegations. The ALJ agrees with TABC Staff finding the evidence produced by TABC Staff was sufficient to support these alleged violations, and that Respondent's permits should be cancelled.

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

**attachments**

pc: Bruce Harris, Attorney for Respondent via facsimile 940/ 322-2453  
 Christopher G. Gee, TABC Staff Attorney via facsimile 512/206-3498