

DOCKET NO. 615676

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
AQUILA VERDE	§	
D/B/A AQUILA VERDE	§	OF
PERMIT/LICENSE NOS. N-082151, PE082152	§	
DENTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-9091)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 3rd day of January, 2006, 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 October 7, 2005, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 5, 2005. The Proposal For Decision, attached 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.

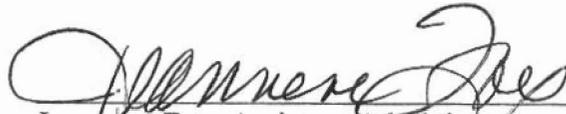
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on January 24, 2006, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this 3rd day of January, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG\bc

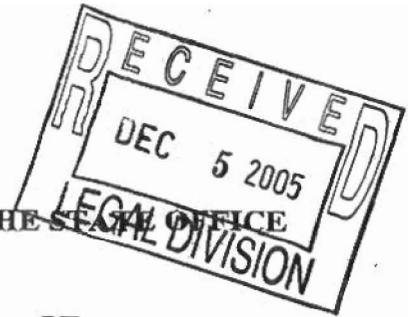
The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
6333 Forest Park Road, Ste. 150-A
Dallas, TX 75235
FAX # (214) 956-8611

AQUILA VERDE
RESPONDENT
d/b/a AQUILA VERDE
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TIMOTHY GRIFFITH
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office



SOAH DOCKET NO. 458-05-9091

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**
Petitioner

BEFORE THE STATE OFFICE

OF

V.

AQUILA VERDE,
Respondent

§
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ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) sought cancellation of the permits held by Aquila Verde (Respondent), alleging that (1) Respondent knowingly possessed uninvoiced alcoholic beverages on the licensed premises, (2) Respondent failed to properly maintain club membership records on the licensed premises and (3) Respondent supplied impure 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. (the Code) ch. 5 and §§ 11.61 and 28.06, as well as 16 TEX. ADMIN. CODE (TAC) §§ 41.50 and 41.52 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 October 7, 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.



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II. DISCUSSION AND ANALYSIS

A. Background

Respondent's licensed premises are located at 911 Ave. C "A", Denton, Denton County, Texas. Respondent holds private club registration permit N-082151, and beverage cartage permit PE-082151, issued by the TABC on May 16, 1974. The permits have been continuously renewed. Essy Moazami serves as secretary for the private club.

B. Applicable Law

Pursuant to the Code, Petitioner may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or the Rules,¹ or has supplied impure or otherwise deleterious beverages.² A private club is required to permanently maintain records of each member. Such records are to include each member's full name, initial membership number, current complete address, date of membership, and date of removal from membership.³

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.⁴ 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.⁵ The law requires the Commission or administrator to **cancel** [emphasis added] the permit of any permittee found by the Commission or

1 § 11.61(b)(2) of the Code.

2 § 11.61(b)(9) of the Code.

3 § 41.52 (c)(1)(D) of the Rules.

4 § 28.06(a) of the Code.

5 § 28.06(c) of the Code.

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administrator, after notice and hearing, to have violated § 28.06 (c) of the Code.⁶

Invoice is defined as an instrument issued by the seller of the alcoholic beverages to a permittee.⁷ 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.⁸ 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.⁹

C. Petitioner's Evidence and Contentions

Petitioner contends that Respondent has operated its premises in violation of the Code and the Rules. No membership records were located on the premises. Impure or deleterious beverages were supplied on the premises, and Respondent knowingly possessed uninvoiced liquor on the premises. Pursuant to § 28.06(c) of the Code and § 41.50 of the Rules, which makes the violation applicable to private clubs, knowingly possessing uninvoiced alcoholic beverages on the premises, regardless of its intended purpose or use, requires the cancellation of Respondent's permits.

1. Testimony of Agent David Doggett

TABC Agent David Doggett conducted an inspection of Respondent's licensed premises on February 4, 2005. Upon entering the premises, he observed Respondent's employee, Moazani Manoutchehr (also believed to be the brother of Essy Moazami, the club's secretary), going over some tickets at the bar. Mr. Manoutchehr appeared to be the person in charge of the premises.

⁶ § 28.06(d) of the Code.

⁷ § 41.50(a)(2) of the Rules.

⁸ § 41.50(h)(1) of the Rules.

⁹ § 41.50(h)(2) of the Rules.

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Agent Doggett observed a 980 ml bottle of Kahlua shelved with other liquors behind the bar. The bottle of Kahlua contained a stamp from Mexico and had no local distributor stamp as required. After first inspecting the bar area, Agent Doggett next conducted an inspection of a rear storage room, where he encountered Respondent's waiter, Mohammad Sharifian.

a. Supplying impure or deleterious beverages

Agent Doggett stated that he found several very old bottles of liquor at the bar. Approximately 26 bottles were "unfit for human consumption" and contaminated with what appeared to be fruit flies inside the liquor bottles and liquid.

b. Knowing possession of uninvoiced alcoholic beverages

Agent Doggett observed a 980 milliliter bottle of Kahlua Liqueur shelved with other liquors behind the bar. The bottle of Kahlua contained a stamp from Mexico and had no local distributor stamp as required. Upon opening the door to the rear storage room, Agent Doggett observed Mr. Sharifian standing next to a filing cabinet near the door and holding a 1.75 liter bottle of Clan MacGregor Scotch. When the agent asked Mr. Sharifian what he was doing in the room, Mr. Sharifian stated that he didn't know what he was doing in the room and was just trying to get out of the room. Agent Doggett took possession of the bottle of Scotch and observed that it had no local distributor stamp on it.

The agent observed two 1.75 liter bottles of Crown Czar Vodka on the filing cabinet. He discovered three 1.75 liter bottles of Glenwood London Dry Gin, Kentucky Derby Whiskey and Moraga Cay Rum hidden behind a shelving unit. None of the bottles of liquor had local distributor stamps affixed on them. According to Agent Doggett, Mr. Sharifian appeared to be attempting to hide the bottles of liquor. When the agent asked Mr. Sharifian why he was hiding the bottles, Mr. Sharifian stated he did not know why. Agent Doggett prepared an inventory of the liquor seized from Respondent's premises and also photographed the items.¹⁰

¹⁰ TABC Exhibit Two, photographs of seized liquor.

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Agent Doggett stated that when no local distributor stamps are affixed to liquor bottles, it means that there are no invoices for the liquor because it was purchased illegally, therefore, they are uninvoiced. Based on his observations and conversations with Respondent's employees on February 4, 2005, Agent Doggett believed Respondent had knowledge that the bottles of liquor were uninvoiced and knowingly possessed the uninvoiced alcoholic beverages found on the premises. According to the agent, when he asked Mr. Sharifian and Mr. Manoutchehr why the uninvoiced liquor was on Respondent's premises, both replied that they did not know why.

c. Failure to properly maintain membership records on the premises

Agent Doggett stated that a private club is required to keep records of its membership on the premises and to make the records available to a TABC representative for verification that the people purchasing alcoholic beverages are members of the private club.¹¹ During the inspection of Respondent's premises, the agent asked Mr. Manoutchehr where the club's membership records were located. Mr. Manoutchehr stated that he did not know where they were and was unable to locate any membership records. According to Agent Doggett, since Mr. Manoutchehr was the person in charge of the premises, he should have known where the records were located and been able to provide the records upon request. After Agent Doggett conducted a very thorough search of every drawer and cabinet on the premises, he concluded that there were no membership records there.

D. Respondent's Evidence and Contentions

Essy Moazami testified at the hearing on behalf of Respondent. Mr. Moazami stated that business is slow and he cannot afford to pay a penalty. He contemplated closing the restaurant approximately eight months ago.

¹¹ 41.52(c)(1)(E) of the Rules.

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a. Supplying impure or deleterious beverages

Mr. Moazami admitted that some of the liquor thrown out by Agent Doggett on February 4, 2005, was very old. Some bottles of liquor dated back to 1974. However, some of the bottles of liquor were recently purchased, but had no expiration dates on them. Mr. Moazami disputed the agent's statement that the liquors contained fruit flies and were unfit for human consumption. According to Mr. Moazami, some liquors, similar to aged wines, form precipitation on the bottom of the bottles because the sugar goes to the bottom, resulting in the appearance of bugs inside the bottle. However, no bugs are present. Mr. Moazami stated that it doesn't mean that the liquor or wine is bad and has to be thrown away. In his opinion, age makes it better.

b. Knowing possession of uninvoiced alcoholic beverages

Mr. Moazami stated that the bottle of Kahlua located at the bar was given to him as a gift by a friend. Mr. Moazami placed the bottle at the bar on February 4, 2005, and forgot to take it home with him.

Mr. Moazami admitted that the bottles of liquor seized by Agent Doggett on February 4, 2005, had no invoices from a Texas distributor and that he knew the liquor was on the premises because he bought it and placed it there. He went on to explain that the seized bottles of liquor were inexpensive liquors used solely for the purpose of cooking certain appetizers, entrees and desserts which require flaming in his Italian restaurant, Milano's.¹² According to Mr. Moazami, he could not use the more expensive, invoiced alcohol for cooking. When he opened the restaurant 31 years ago, a TABC representative named Steven had given him permission to have alcohol on the premises for cooking. He stated that he was hiding the cheap liquor from his waiters. But, somehow the waiters found it and Mr. Sharifian then panicked and tried to hide it from Agent Doggett.

¹² Respondent's Exhibit One, restaurant menu.

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c. Failure to properly maintain membership records on the premises

Mr. Moazami stated that he does everything regarding the membership records for the club. He was gone when Agent Doggett arrived to do the inspection on February 4, 2005, and the private club was closed. The membership records are kept in a box on the restaurant floor near a square table in the corner. According to Mr. Moazami, he went to Agent Doggett's office the following Tuesday, explained that he had the membership records and offered to either bring the records to the agent's office for review or have the agent stop by Respondent's premises to review them. Agent Doggett stated that he would come Respondent's premises one day.

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. The ALJ finds Agent Doggett's statement that he personally observed fruit flies inside numerous bottles of liquor located at the bar to be more credible than Mr. Moazami's statement that precipitation and sugar created the appearance of bugs inside the bottles. On February 4, 2005, Respondent's employee was unable to produce the required membership records upon Agent Doggett's request for inspection. The agent was also unable to locate the records on the premises.

Mr. Moazami admitted that he purchased the uninvoiced liquors seized on February 4, 2005, and placed them on the premises, albeit for cooking. Mr. Moazami's explanations regarding each of the alleged violations, even if true, do not legally excuse or justify the violations. The Code and the Rules require the permittee to purchase alcoholic beverages from the supplier. 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.¹³ Respondent knew that the uninvoiced liquors seized on February 4, 2005, were possessed on Respondent's licensed premises in violation of the Code and

¹³ § 41.50(h)(2) of the Rules.

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the Rules.

III. Recommendation

Petitioner requested that Respondent's permits be canceled. A permittee's knowing possession 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 are located at 911 Ave. C "A", Denton, Denton County, Texas.
2. Respondent holds private club registration permit N-082151, and beverage cartage permit PE-082152, issued by the TABC on May 16, 1974.
3. On February 4, 2005, TABC Agent David Doggett conducted an inspection of Respondent's licensed premises.
4. The agent located approximately 26 bottles of contaminated liquor which contained fruit flies behind the bar.
5. Agent Doggett observed a bottle of Kahlua Liqueur at the bar with a Mexican stamp affixed on the bottle but no local distributor stamp.
6. The agent observed Respondent's employee, Mohammad Sharifian, in a rear storage room attempting to hide five bottles of liquor which had no local distributor's stamp affixed on the bottles.
7. Agent Doggett seized, inventoried and photographed the uninvoiced alcoholic beverages.
8. Respondent's employee, Moazani Manoutchehr, was the person in charge of the premises on February 4, 2005, and was unable to locate any private club membership records on the premises upon Agent Doggett's request.
9. Essy Moazami, secretary for Aquila Verde, knew that the uninvoiced bottle of Kahlua found at the bar and the five uninvoiced bottles of liquor found in the rear storage room were possessed by Respondent on the licensed premises.

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10. On August 5, 2005, 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.
11. The hearing was held on October 7, 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 and 41.52 of the TABC Rules (the Rules).
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 has supplied impure or otherwise deleterious beverages, in violation of § 11.61(b)(9) of the Code.
5. Respondent failed to properly maintain club membership records on the licensed premises, in violation of § 5.32 of the Code and § 41.50(h)(2) of the Rules.
6. 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.
7. Respondent's permits should be canceled pursuant to § 28.06(d) of the Code.

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SIGNED December 5, 2005.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS