

DOCKET NO. 458-07-0146

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

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BEFORE THE STATE OFFICE

V.

OF

ARACELI CADENA D/B/A
CLUB LOS DOS LAREDOS,
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Araceli Cadena d/b/a Club Los Dos Laredos (Respondent), alleging that Respondent committed a violation¹ of the Texas Alcoholic Beverage Code (the Code) by permitting the use or display of the Respondent's TABC-issued permit and license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit. The TABC Staff seeks cancellation of Respondent's permit and license. The Administrative Law Judge (ALJ) finds TABC Staff's evidence insufficient to establish the above-listed violation. The ALJ recommends that no enforcement action be taken against Respondent.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 11, 25, 70, and 109. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing 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. ch. 2001. There were no contested issues concerning notice or jurisdiction in this proceeding. Accordingly, those matters will be addressed in the Findings of Fact and Conclusions of Law sections of this

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

Proposal for Decision.

On November 17, 2006, a hearing was convened before ALJ Tanya Cooper. TABC Staff was represented by Judith L. Kennison, TABC Staff Attorney. Respondent appeared and represented herself at the hearing. The record closed on November 20, 2006.

II. EVIDENCE

Respondent holds a Wine & Beer Retailer's On-Premise Permit and Retailer's On-Premise Late Hours License, BG-620500, issued by TABC to Araceli Cadena d/b/a Club Los Dos Laredos, located at 301 E. Ave B, Temple, Bell County, Texas. TABC Staff asserts that Respondent participated in a subterfuge in the operation of the above-listed premise because she permitted the use or display of the permit and license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit.

James Clayton Pratt, an enforcement officer for the Texas Comptroller's Office, testified that he was assigned to collect past due taxes from Respondent in relation to the operation of this licensed premise. He said that he had visited the licensed premise, but no one had been there at the time of his visit. Mr. Pratt stated that later on, Respondent's brother, Ramon Cadena, came into the Comptroller's Office and advised that he wanted to take care of the past due taxes concerning his sister's licensed premises.

Mr. Pratt said he inquired about Mr. Cadena's interest in Respondent's business. According to Mr. Pratt, Mr. Cadena advised that he was taking care of Respondent's licensed premise while she was away on a family matter in Mexico. Mr. Pratt stated that he asked Mr. Cadena why he had not acquired a TABC-issued permit to operate the licensed premise under his own name, and Mr. Cadena revealed that he had a criminal history that would preclude his ability to secure a TABC-issued permit or license.

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Mr. Pratt testified that he did not accept the past due tax payment from Mr. Cadena because he was not listed as a person with any authorized connection to the tax account. He further said that he reported this information to TABC Staff because he believed the operation of this licensed premise, as described by Mr. Cadena, was illegal.

Agent R. Suarez said in his testimony that he was advised by Mr. Pratt concerning his suspicions about this licensed premise's operations. Agent Suarez stated that he had met with Respondent while her application was being processed in 2005. Respondent had failed to respond to a question on her application; and there was a question about her criminal history. During a meeting, Agent Suarez said that he had specifically asked Respondent about her brother, Ramon Cadena, and how he was employed, because Mr. Cadena had called several times with questions concerning Respondent's application. At the time, Respondent told Agent Suarez that Mr. Cadena was self-employed in the construction business. According to Agent Suarez, Respondent was aware throughout the application process that the licensed premise was required to be under her exclusive control.

Agent D. Garcia, a TABC Staff enforcement investigator, testified that he went to the licensed premise on March 29, 2006, to follow up on Mr. Pratt's report of a possible ongoing subterfuge operation. Upon entering the licensed premise, Agent Garcia contacted Mr. Cadena, who was working that evening as the licensed premise's bartender. After advising Mr. Cadena concerning his rights against self-incrimination, Mr. Cadena agreed to speak with him about the licensed premise's operations.

Mr. Cadena said that Respondent owned the licensed premise, but that he was operating it for her until she could return to operate the bar on weekends. Mr. Cadena told Agent Garcia that he was currently responsible for opening and closing the licensed premise for business, and that this had been the arrangement between himself and his sister since opening the licensed premise. According to Mr. Cadena, Respondent was away working on a job in Pflugerville, Texas.

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Agent Garcia said he asked to see some of the licensed premise's records, which Mr. Cadena produced from him. These records included utility bills and bank statements. Agent Garcia, noted that the electric bill for the licensed premise was in Mr. Cadena's name. When asked about this, Mr. Cadena replied that he had opened the account in Respondent's absence, so the account was listed his name. In reviewing bank statements with Agent Garcia, Mr. Cadena said that he was authorized to make deposits and withdraw funds from the licensed premise's bank account. Mr. Cadena also said that he had a credit card issued in his name, which was used for making supply purchases necessary in operating the licensed premise. All other utilities, including the telephone bill, were listed in Respondent's name.

Agent Garcia said that he believed Mr. Cadena was in control of the licensed premise because Agent Garcia had made several attempts to speak with Respondent and was never able to contact her. Consequently, he testified that Respondent's permit and license should be cancelled.

III. ANALYSIS

Section 109.53 of the Code provides for several activities that are prohibited in the operation of a licensed premise.² Collectively, these violations are frequently referred to as engaging in a subterfuge. And while the term "subterfuge" is not specifically defined within the provisions of the Code, its common meaning is defined as a deception in order to . . . escape, or evade; or a deceptive device or stratagem. (See Webster's Collegiate Dictionary, Tenth Edition).

TABC Staff, in its Notice of Hearing provided to Respondent, elected to allege that Respondent was in violation of the Code because she had consented to the use or display of her

² The following are some of the activities which can comprise a subterfuge operation in violation of the Code: *No person shall consent to the use of or allow his permit to be displayed by or used by any person other than the one to whom the permit was issued; every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises; and any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to person other than the permittee shall be unlawful.* TEX. ALCO. BEV. CODE ANN. § 109.53. (Emphasis added).

permit in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit. Put another way, TABC Staff asserted that Respondent allowed her permit and license to be used by her brother, Ramon Cadena, to conduct business at the licensed premise for the benefit of himself, a person who was not otherwise legally qualified to hold a TABC-issued permit or license. TABC Staff failed to meet its burden of proof concerning the violation it alleged.

The evidence showed that Mr. Cadena was operating the licensed premise in Respondent's absence. However apart from a single utility account that appeared in Mr. Cadena's name, Mr. Cadena's actions (opening and closing the business, purchasing supplies, making deposits into Respondent's bank account, etc.) appeared to be akin to the activities performed by a general manager of a business. Other utility bills, the licensed premise's tax account, and bank statements reflected Respondent's name.

More importantly, there was no evidence of what, if any, benefit Mr. Cadena was receiving as a result of the operation of this licensed premise, which is crucial in establishing TABC Staff's alleged violation in this matter. Mr. Cadena repeatedly stated that he was operating the licensed premise for Respondent's benefit while she was away. Absent the showing of what benefit Mr. Cadena was receiving from the licensed premise's operation, the ALJ recommends that no enforcement action be taken against Respondent in connection to this matter.

III. FINDINGS OF FACT

1. Araceli Cadena, d/b/a Club Los Dos Laredos (Respondent) holds a Wine & Beer Retailer's On-Premise Permit and a Retailer's On-Premise Late Hours License, BG-620500, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 301 E. Ave B, Temple, Bell County, Texas.
2. During March 2006, Respondent was away from her licensed premise referred to in Finding of Fact No. 1.
3. In Respondent's absence, her brother, Ramon Cadena, managed the licensed premise for Respondent's benefit.

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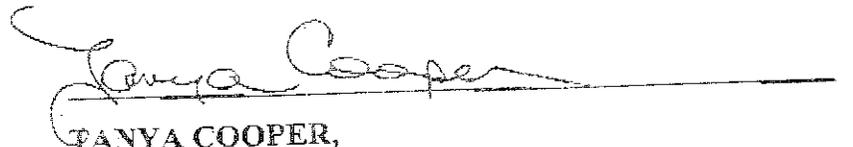
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4. Mr. Cadena performed activities, such as ordering supplies, paying bills, and bartending while the business was open.
5. No evidence was presented to establish that the licensed premise was operated for Mr. Cadena's benefit, or any other person other than Respondent.
6. On November 17, 2006, a hearing was convened at with Administrative Law Judge Tanya Cooper, State Office of Administrative Hearings, presiding. TABC Staff was represented at the hearing by Judith L. Kennison, TABC Staff Attorney. Respondent appeared and represented herself. The record in matter closed on November 20, 2006.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 11, 25, 70, and 109.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating 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 hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based upon Findings of Fact Nos. 2 - 5, Respondent did not permit the use or display of her TABC-issued permit and license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit.
5. Based upon Findings of Fact Nos. 2 - 5, and Conclusion of Law No. 4, no enforcement action should be taken against Respondent's Wine & Beer Retailer's On-Premise Permit and Retailer's On-Premise Late Hours License BG-620500 issued by TABC for the violation alleged in this proceeding.

DATE SIGNED: DECEMBER 4, 2006.


TANYA COOPER,
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS