

DOCKET NO. 584786

IN RE ROGER ESTRADA
D/B/A ONE MORE TIME CLUB
PERMIT NO. BG413334
LICENSE NO. BL413335

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-99-2419)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of May, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sue Berkel. The hearing convened on November 15, 1999 and adjourned November 15, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 9, 2000. This Proposal For Decision 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 unless Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **26th day of June, 2000**, all rights and privileges under the above described permit and license will be **SUSPENDED** for a period of seven (7) days beginning at **12:01 A.M. on the 3rd day of July, 2000**.

This Order will become final and enforceable on May 25, 2000, 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 3rd day of May, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Sue Berkel
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Roger Estrada
d/b/a One More Time Club
RESPONDENT
1619 W. Malone
San Antonio, Texas 78225
CERTIFIED MAIL RRR NO. Z 473 042 758

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office



**INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION**

April 19, 2000

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-2419
TABC Case No. 584786
Roger Estrada d/b/a One More Time Club
Wine and Beer Retailer's Permit (BG-413334) Retail Dealer's Late Hours
License (BL-413335)
Nueces County, Texas

I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the license at the above referenced location should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposal for Decision, suspending the License for a period of **SEVEN (7)** days unless a civil penalty in the amount of \$1,050.00 is paid in lieu of the suspension.

Please make a copy of this decision and submit it along with the order to the respective parties.

A handwritten signature in cursive script, appearing to read "Randy Yarbrough", written over a horizontal line.

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TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	OF
	§	
ROGER ESTRADA D/B/A ONE MORE	§	
TIME NIGHT CLUB, PERMIT NO.	§	
BG-413334, LICENSE NO. BL-413335	§	
TABC CASE NO. 584786	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff brought this action seeking a monetary penalty or a suspension of Respondent's license and permit. Staff alleged that Roger Estrada d/b/a One More Time Night Club (Respondent) or its agent permitted consumption of alcohol during prohibited hours and purchased alcoholic beverages while on the delinquent list. This proposal finds that purchasing alcohol while on the delinquent list is not a violation. This proposal also finds that Respondent did permit consumption of alcohol during prohibited hours and recommends a seven day suspension. The Administrative Law Judge (ALJ) further recommends that Respondent be given an opportunity to pay a civil penalty in lieu of suspension in the amount of \$1050.

I. PROCEDURAL HISTORY, JURISDICTION AND NOTICE

At a public hearing on November 15, 1999, Staff appeared through its attorney, Gayle Gordon. Roger Estrada appeared to represent himself. There were no disputed issues of notice or jurisdiction so those issues will be discussed in the findings of fact and conclusions of law. James Kuvet was the ALJ who presided over the hearing which concluded on November 15, 1999. Subsequently, the case was reassigned to ALJ Sue Berkel, who reviewed the entire record as required by TEX. GOV'T CODE ANN. § 2001.062(c) and 1 TEX. ADMIN. CODE 155.17(c) and wrote this Proposal for Decision.

II. LEGAL STANDARD, EVIDENCE AND ANALYSIS

A. Purchasing Alcohol While on the Delinquent List

TABC is authorized to suspend a permit for not more than 60 days, pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §11.61(b)(2), if a licensee violates any provision of the Code. In this case, TABC has alleged that Respondent has purchased alcohol while on the delinquent list in violation of §102.32(d) of the Code.

Respondent holds a Wine and Beer Retailer's Permit, BG-413334, and Retail Dealer's On-Premise Late Hours License, BL-413335. Agent Harris, and enforcement agent with TABC,

testified that when retailers are delinquent in paying the wholesaler money due for the purchase of liquor, the wholesaler reports the retailer as delinquent in payment to TABC. TABC then notifies all wholesalers that the particular retailer is delinquent. Wholesalers are then prohibited from selling any more alcohol to that retailer until the delinquent account is paid in full. On July 2, 1999, Agent Harris went to Respondent's business to determine if Respondent had purchased any alcohol while on the delinquent list. Respondent had been placed on the delinquent list on December 14, 1998, and was removed from that list on July 5, 1999. Agent Harris checked all of the purchase invoices in Respondent's possession and determined that Respondent had purchased alcohol in May and June of 1999.

Although TABC did prove that Respondent purchased alcohol while on the delinquent list, that is not a violation of §102.32(d). §102.32(d) only prohibits wholesalers from selling "any liquor to a retailer who is delinquent..." Because the prohibition in §102.32(d) applies to actions by wholesalers, Respondent did not violate that specific code section and it cannot form the basis for suspension of Respondent's permit.

B. Consumption of Alcoholic Beverages During Prohibited Hours

TABC has also alleged that Respondent permitted alcoholic beverages to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited in violation of §61.71(18) of the Code. §105.06 of the Code prohibits consumption of alcoholic beverages on the licensed premises after 2:15 a.m.

Agent Michael Wallace Cantrell, an enforcement agent with TABC, testified that on May 30, 1999, at 2:15 a.m., he and Agent Smith were patrolling and observed a large number of cars parked in the parking lot of Respondent's business. Agents Smith and Cantrell parked their car and went to investigate whether there was after hours drinking on Respondent's premises. At 2:35 a.m., Agent Cantrell looked into a window and observed a woman sitting at the bar with a clear glass half filled with amber colored liquid. Agent Cantrell testified that he observed the woman drink from the glass several times. Agents Cantrell and Smith then entered Respondent's premises through a back door. Agent Cantrell approached the woman he had seen drinking and noticed that the glass that she was drinking from was now empty. He picked up the glass and noticed that it smelled of whiskey. Agent Cantrell then wrote the woman a criminal citation for drinking an alcoholic beverage after hours and wrote Respondent a citation for permitting the woman to consume alcoholic beverages after hours.

Agent Smith testified that as Agent Cantrell looked through the window into the Club, he told Agent Smith that he saw a woman drinking at the bar. As Agent Smith entered the establishment he observed several patrons with alcoholic beverages on their table but did not issue any citations because he did not observe any of the patrons actually drinking from their glasses.

Sandra Esparza testified on behalf of Respondent. She stated that she arrived at the Club at around midnight. She testified that she had a glass of liquor with her as she attempted to enter the Club. The bouncer at the Club asked her to drink all of the contents of the glass before she entered the Club. She drank the liquor in the glass then went and sat at the bar. Ms. Esparza then testified

that a man came into the bar, smelled her empty glass, then gave her a ticket. Ms Esparza left the bar at around 3:50 a.m. after the employees had finished cleaning the bar. One of the employees then gave her a ride home.

Mr. Martinez, a bouncer employed by Respondent for the last seven months, also testified on behalf of Respondent. Mr. Martinez testified that someone had dropped Ms. Esparza off at the bar and that she tried to come into the Club with a mixed drink in her hand. Mr. Martinez asked her to drink the beverage before she entered the Club. Ms. Esparza complied with his request and then entered the Club.

TABC has the burden to show that it is more likely than not that Respondent's agent permitted alcoholic beverages to be consumed during a time prohibited by the Code. TABC met that burden. Agent Cantrell observed Ms. Esparza drink what he later determined to be whiskey after 2:30 a.m. Agent Cantrell's testimony is credible because there was no indication that he was so biased against Respondent that he would commit perjury. In addition, Agent Cantrell exclaimed that he saw a woman drinking to Agent Smith as Agent Cantrell was looking through the window. This supports Agent Cantrell's credibility. Furthermore, the Agents did not ticket other individuals who had alcoholic beverages on their tables because the agents did not see those individuals drinking. Ms. Esparza, on the other hand, had some connection to the Club because she waited almost an hour after closing to get a ride home with one of the employees. It is also somewhat unlikely that Ms. Esparza, who had been drinking before she entered the Club, would sit at the bar for almost three hours and never order another drink.

When TABC is authorized to suspend a permit or a license, it must give the permittee an opportunity to pay a civil penalty in lieu of suspending the permit. The amount may not be less than \$150 or more than \$25,000 for each day the permit was to have been suspended. If the penalty is not paid before the sixth day after TABC notifies him of the amount, the permittee loses the opportunity to pay it and TABC is required to impose the suspension. In this case, TABC requested a seven day suspension, but also asked that Respondent be allowed to pay the minimum civil penalty in lieu of suspension as provided in TEX. ALCO. BEV. CODE ANN. §11.64(a).

The ALJ recommends that Respondent's license be suspended for seven days. However, the ALJ recommends that Respondent be given an opportunity to pay a civil penalty in the amount of \$1050 in lieu of suspension before the sixth day after TABC notifies him of its order.

III. PROPOSED FINDINGS OF FACT

1. Roger Estrada d/b/a One More Time Night Club (Respondent) holds a Wine and Retailer's Permit, BG-413334, and Retail Dealer's On-Premise Late Hours License, BL-413335, issued by the Texas Alcoholic Beverage Commission (TABC).
2. On October 22, 1999, TABC timely sent Notice of Hearing by certified mail, return receipt requested to Respondent's address of record. On November 3, 1999, TABC timely sent a Second Amended Notice of Hearing by regular mail to Respondent's address of record. The Notice of Hearing and the Second Amended Notice of Hearing timely informed Respondent of the issues to

be decided, the right to appear and be represented by counsel, the date and place of the hearing, and the statutes and rules involved.

3. The hearing was held on November 15, 1999, at the State Office of Administrative Hearings (SOAH), located at 1015 Jackson Keller, Suite 102-B, San Antonio, Texas with Administrative Law Judge (ALJ) James Kuvet presiding. Gayle Gordon, TABC's General Counsel, appeared to represent TABC and Respondent appeared to represent himself. The record closed on November 15, 1999. ALJ Sue Berkel, who reviewed this entire record as required by TEX. GOV'T CODE ANN. §2001.062(c), wrote this Proposal for Decision.
4. Respondent became delinquent in the payment of an account for liquor.
5. TABC placed Respondent on its delinquent list on December 14, 1998, and Respondent was removed from that list on July 5, 1999, for payment of monies owed.
6. Respondent purchased liquor in May and June of 1999.
7. On May 30, 1999, Respondent and Respondent's agents permitted Sandra Esparza to consume alcoholic beverages at 2:35 a.m. while at One More Time Night Club.

IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter, pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61 and 61.71.
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. Ch. 2003.
3. Proper and timely notice of the hearing was effected upon the Respondent, pursuant to TEX. GOV'T CODE ANN. Ch. 2001.
4. Based on the foregoing Findings of Fact, Respondent did not violate TEX. ALCO. BEV. CODE ANN. §102.32(d).
5. Based on the foregoing Findings of Fact, Respondent did permit the consumption of alcoholic beverages during prohibited hours in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71, 11.61, and 105.06.
6. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Wine and Beer Retailer's Permit, BG-413334, and Retail Dealer's On-Premise Late Hours License, BL-413335 should be suspended for seven days.

7. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent should be permitted to pay a civil penalty of \$1050 in lieu of the suspension of his license.

Signed this 9 day of March, 2000.



Sue Berkel
Administrative Law Judge