

**DOCKET NO. 584789**

IN RE ANDY'S PRIVATE CLUB	§	BEFORE THE
PERMIT NOS. N-448293, NL-448294,	§	
PE-448295 & FB-448296	§	
	§	TEXAS ALCOHOLIC
	§	
DENTON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0056)	§	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 Tanya Cooper. The hearing convened on February 22, 2000 and adjourned February 22, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 28, 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. 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 FOUND**, 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 Permit Nos. N-448293, NL-448294, PE-448295 & FB-448296 should be **CANCELED FOR CAUSE**.

**IT IS FURTHER FOUND** that there are mitigating circumstances in that the violations were technical ones and therefore it is **ORDERED** that the cancellation be set aside and a fee of \$500.00 be imposed under the authority of Sec. 11.64(b) of the Texas Alcoholic Beverage Code. **IT IS ORDERED** that the said fee is to be paid on or before June 14, 2000.

**This Order will become final and enforceable on May 24, 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

TEG/bc

The Honorable Tanya Cooper  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (214) 956-8611**

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

R. Scott Alagood  
**ATTORNEY FOR RESPONDENT**  
1200 West University Drive, Ste. 150  
Denton, Texas 76201  
**CERTIFIED MAIL/RRR NO. Z 473 040 090**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Dallas District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

MAR 3 | 2000

March 29, 2000

Doyne Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

CERTIFIED MAIL, Z 283 051-938  
RETURN RECEIPT REQUESTED

APR 3 2000

LEGAL DIVISION

RE: Docket No. 458-00-0056; Texas Alcoholic Beverage Commission vs. Andy's Private Club,  
TABC Case No. 584789

Dear Mr. Bailey:

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 Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Andy's Private Club, Respondent. For reasons discussed in the proposal, I recommend that Respondent's permits should be canceled.

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. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Tanya A. Cooper,  
Administrative Law Judge

TC:ds

Enclosure

xc: Shanee Woodbridge, State Office of Administrative Hearing - **Regular Mail**; Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - **Regular Mail**; Andy's Private Club, 122 N. Locust, Denton, Texas 76201-  
CMRR # Z 283 051 939

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

V.

ANDY'S PRIVATE CLUB  
DENTON COUNTY, TEXAS  
(TABC CASE NO. 584789)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this action against Andy's Private Club (Respondent), seeking cancellation of Respondent's permits alleging that its agent or employee made a false or misleading statement within Respondent's application for permits; and that at the time Respondent's application for permits was filed, Respondent had failed to obtain a building suitable for the licensed premises. This proposal finds that a false or misleading statement was made on Respondent's application and that a suitable building was not available to the licensed premises at the time the application was filed. The Administrative Law Judge recommends that Respondent permits be canceled.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01, and §32.01. 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, under TEX. GOV'T CODE ANN. §2003.021. There are no contested issues of notice or jurisdiction in this proceeding.

On February 22, 2000, a hearing convened before Tanya Cooper, Administrative Law Judge (ALJ), of the State Office of Administrative Hearings, at 2100 North Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented at the hearing by its agent, James A. Bostick. Evidence was received and the record was closed on February 22, 2000.

## APPLICABLE LAW

TABC is authorized to cancel an original or renewal permit if it is found that the permittee made a false or misleading statement in connection with his original or renewal application either in the formal application itself or in any other written instrument relating to the application submitted to the Commission. TEX. ALCO. BEV. CODE § 11.61(b)(4)(Vernon 2000). A private club registration is also subject to cancellation on a finding that the permittee has failed to maintain an adequate building at the address for which the private club registration permit was issued, or violated any provision of the Texas Alcoholic Beverage Code (the Code). TEX. ALCO. BEV. CODE § 32.17(a) (5) and (8)(Vernon 2000).

## EVIDENCE AND ANALYSIS

Respondent holds a Private Club Registration Permit, N-448293, a Private Club Late Hours Permit, NL-448294, a Beverage Cartage Permit, PE-448295, and a Food and Beverage Certificate, FB-448296, issued to Andy's Private Club, 122 N. Locust, Suite B, Denton, Denton County, Texas. TABC alleges that false or misleading statements were made in Respondent's application for these permits concerning the premises' leased building space.

On February 9, 1999, Respondent's agent, James A. ("Andrew" or "Andy") Bostick, executed an application for permits, swearing that the statements contained within the application were true and correct. On March 15, 1999, this application was submitted to TABC agent, G. Alba.

The application included a Lease Agreement dated March 6, 1998, between PHC, Inc. and Andy's Bar and Grill and/or Andy Bostick, for the property located at 122 N - B Locust Street, but did not contain signatures by either party. The terms of this agreement provided that no assignment of the agreement or sub-letting of the premises were permissible, except "**that Tenant is permitted sublease property to Andy's Club, where Andy's Club is operated by the same Tenant.**" A sublease agreement accompanied the Lease Agreement in the application indicating the Andy's Private Club had obtained a sublease to the premises pursuant to this provision of the Lease Agreement effective on February 1, 1999. Because Respondent application appeared on its face to meet all requirements for permit issuance, TABC issued the permits to Andy's Private Club on April 9, 1999.

On May 13, 1999, Craig M. Fisher, President and CEO of PHC, Inc., contacted the TABC and informed Agent Alba that the Lease Agreement submitted in Respondent's permit application was not a valid agreement for lease of the property located at 122 N. Locust, Suite B, Denton, Denton County, Texas, and owned by PHC, Inc. Mr. Fisher produced a Lease Agreement signed by himself for PHC, Inc., and James H. Bostick for Andy's Bar and Grill. This agreement covered the lease term, January 1, 1998, through January 1, 2001, and was signed on March 20, 1998. The provisions of this executed lease agreement precluded **any** assignment or subletting of the premises.

Clearly from the testimony of Mr. Bostick and Mr. Fisher at the hearing and the documentary

evidence presented, the relationship between the two men had become strained over the course of this lease agreement. A dispute had existed between PHC, Inc., and Mr. Bostick d/b/a Andy's Bar and Grill regarding reimbursements for improvements made to the property claimed by the lessee, Mr. Bostick. This dispute was ended with the execution of a Compromise and Settlement Agreement between the parties on June 1, 1999.

According to the testimony of Mr. Fisher and Mr. Bostick, negotiations were ongoing after the initial lease was executed to revise certain lease provisions, including the amount of monthly rental payments and subletting issues. Several drafts of a new lease were exchanged during these negotiations between the parties, one of which was the Lease Agreement that was submitted with Respondent's application, as testified to by Mr. Bostick.

Mr. Bostick offered no convincing evidence to support that the initial Lease Agreement's terms prohibiting subletting of the premises or assignment of the lease agreement had been modified on February 9, 1999, the date Respondent's application was filed with TABC.

Agent Alba testified that when he received the application from Mr. Bostick, that included the unsigned Lease Agreement, he thought it was a copy of a valid lease for the proposed premises. Based upon this belief, and the remainder of Respondent's application, Respondent's permits were issued. It was not until contacted by Mr. Fisher on May 13, 1999, that Agent Alba learned that Respondent's application had contained a false or misleading statement, namely the subletting provision contained within the unsigned Lease Agreement, and that at the time of the application's submission, Respondent was not lawfully entitled to use the premises at 122 N. Locust Street, Suite B, Denton, Denton County, Texas.

The authority for subletting the premises to Andy's Private Club did not become effective until June 1, 1999, after the issuance of Respondent's permits. This was demonstrated by TABC's Exhibit 4, a letter granting Andy's Bar and Grill the right to sub-lease rental space to Andy's Club for the purpose of selling mixed drinks, which was signed by Craig M. Fisher and Andy Bostick on June 1, 1999.

#### RECOMMENDATION

The ALJ recommends that Respondent's permits be canceled for the reasons stated above. Any other requests for entry of specific findings of fact or conclusions of law, any other requests for general or specific relief, if not expressly set forth below, are denied.

#### FINDINGS OF FACT

1. Andy's Private Club (Respondent) holds a Private Club Registration Permit, N-448293, a Private Club Late Hours Permit, NL-448294, a Beverage Cartage Permit, PE-448295, and a Food and Beverage Certificate, FB-448296, for a premises located at 122 N. Locust, Suite B, Denton, Denton County, Texas.

2. On January 22, 2000, the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing through its agent, James A. Bostick.
3. On February 9, 1999, James A. Bostick, executed an application for permits associated with the operation of a private club to be located at 122 N. Locust Street, Suite B, Denton, Denton County, Texas, to the TABC on behalf of Respondent.
4. An unsigned Lease Agreement, dated March 6, 1998, between PHC, Inc., and Andy's Bar and Grill and/or Andy Bostick, was submitted by Mr. Bostick with this application, along with a sublease agreement for Andy's Private Club to the proposed premises at 122 N. Locust Street, Suite B, Denton, Texas; the sublease purported to be effective on February 1, 1999.
5. Based upon the application filed by Mr. Bostick, TABC issued Respondent the permits described in Finding of Fact 1 on April 9, 1999.
6. The Lease Agreement and accompanying sublease agreement described in Finding of Fact 4 which were submitted with Respondent's application were not valid at the time Respondent's permit application was submitted to the TABC.
7. Based upon Finding of Fact 6, at the time of Respondent's application and the TABC's issuance of permits described in Finding of Fact 1, Respondent did not have lawful access to a building suitable for a licensed premises.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §6.01 and §32.01(Vernon 2000).
2. 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, pursuant to TEX. GOV'T CODE ANN. Ch. 2003 (Vernon 2000).
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 through 6, Respondent made a false or misleading statement in connection with its original permit application submitted to TABC. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(4)(Vernon 2000).
5. Based on Findings of Fact Nos. 3 through 7, Respondent did not have lawful access to a

building suitable for a licensed premises at the time its permit application was filed or when TABC issued the permits to Respondent described in Finding of Fact 1; and therefore has failed to provide an adequate building at the address submitted to the TABC in its application. TEX. ALCO. BEV. CODE ANN. § 32.17(a)(5) and (8)(Vernon 2000).

6. Based on Findings of Fact Nos. 3 though 7, and Conclusions of Law No .4 and 5, Respondent's permits should be canceled.

SIGNED this 28<sup>th</sup> day of March, 2000.

  
TANYA COOPER  
Administrative Law Judge  
State Office of Administrative Hearings