DOCKET NO. 589026

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	ALCOHOLIC BEVERAGE
AFTERBURNER	§	
PERMIT NOS. MB247399, LB247400	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1703)	§	COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 28th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on September 19, 2000, and adjourned on October 3, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 29, 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 the above-referenced Permit No. MB247399 and LB247400 are hereby **SUSPENDED.**

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **$1050.00** on or before the **28th** day of **February, 2001**, all rights and privileges under the above described permits will be **SUSPENDED for a period of seven (7) days, beginning at 12:01 A.M. on the 7th day of March, 2001.**

This Order will become final and enforceable on January 18, 2001, 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 on this the 28th day of December, 2000.

On Behalf of the Administrator,

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/vr

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

Holly Wise, Docket Clerk
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4994

Will Sutherland
Afterburner
RESPONDENT
6515 W. Military Drive
San Antonio, Texas 78227
CERTIFIED MAIL/RRR NO. Z 280 626 869

Licensing Division
San Antonio District Office

DOCKET NO. 458-00-1703

TEXAS ALCOHOLIC BEVERAGE COMMISSION, PETITIONER	§	BEFORE THE STATE OFFICE
V.	§	
	§	OF
AFTERBURNER PERMIT NOS. MB-247399, & LB-247400 TRAVIS COUNTY, TEXAS, (TABC CASE NO. 589026) RESPONDENT	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (the Commission or TABC) brought this action against a permit holder of the Commission alleging that the Permittee was intoxicated on the licensed premises. Staff recommended that the subject permits be suspended for 15 days and the Permittee be allowed to pay $150.00 per day in lieu of suspension for violation of the Texas Alcoholic Beverage Code (the Code). The Permittee, a corporation, appeared at the hearing represented by its owner, Will Southerland. Because Mr. Southerland is the sole owner of the corporation, he will be referred to as the Permittee in this Proposal For Decision which recommends the permits be suspended for 7 days and that the Permittee be allowed to pay $150.00 per day in lieu of suspension.

I. Procedural History, Notice, and Jurisdiction

On June 19, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at 5615 W. Military, San Antonio, Texas 78227. No party challenged notice, jurisdiction, or venue. The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

The hearing commenced on September 19, 2000, in the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. Staff was represented by attorney

Christopher Burnett. Will Southerland represented Respondent *pro se.* The hearing concluded that day but the record was left open to allow Staff the opportunity to provide documents concerning the income of the licensed premises. No such documents were provided and the record was closed on October 3, 2000.

II. Evidence

A. Testimony of TABC witnesses.

1. Michael Cantrell.

Mr. Cantrell testified that he is employed as an agent for TABC and has been so employed for two years. He has received training on detection of intoxication and is a certified field sobriety test officer. He was on the licensed premises on February 12, 2000, accompanied by agent Mike Hodges. The agents were on routine patrol and observed a large number of vehicles in the parking lot at 2:30 a. m. On that date Mr. Cantrell observed Will Southerland passed out in the driver's seat of a vehicle by the front door of the bar. He recognized Mr. Southerland as the owner of Afterburner because of prior contacts. After about 45 seconds Mr. Cantrell and several other officers were able to awaken Mr. Southerland. Mr. Southerland had a very strong odor of an alcoholic beverage on his breath, was extremely unsteady on his feet, and had slurred speech. The officers initially attempted to have Mr. Southerland perform field sobriety test, but, as he could not stand without support, decided it would be too dangerous. Other individuals on the premises told Mr. Cantrell that Mr. Southerland had been drinking all day while working at the bar.

2. Mike Hodges.

Mr. Hodges testified that he is employed as an agent for TABC and has been so employed for nine years. He was on the premises on February 12, 2000, and described the events in the same way as Mr. Cantrell.

B. TABC Exhibit No. 1.

Admitted without objection was TABC Exhibit No. 1, the administrative history of the licensed premises, showing an extensive record of violations. The parties agreed that the violations described in the exhibit occurred prior to Mr. Southerland's purchase of the business.

C. Testimony of Will Southerland.

Mr. Southerland testified that he was passed out in his vehicle when the officers found him, but claimed that he was not intoxicated. He consumed a few drinks that day and was extremely tired from working long days at the bar. It was the exhaustion that caused him to appear intoxicated.

Finally, Mr Southerland testified that the licensed premises is a small operation and averages about $400.00 to $500.00 per day gross.

III. Statutory Criteria

1) TEX. ALCO. BEV. CODE ANN §§ 11.61

(b) 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 of the following is true:

. . .

(2) the permittee violated a provision of this code or a rule of the commission;

. . .

(13) the permittee was intoxicated on the licensed premises;

IV. Discussion

The preponderance of the evidence suggests that Mr. Southerland was clearly intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN § 61.71 (b) (13).

The Standard Penalty Chart found at 16 TEX. ADMIN. CODE § 37.60 (b)provides for a seven day suspension for a first violation of the license or permit holder or any employee being intoxicated on a licensed premise. Even though the corporation Afterburner has a significant history of violations, none occurred under the ownership of Mr. Southerland. Further, there is no evidence that any of the persons involved with operations of the premises under the previous owner is currently connected to the bar. Therefore, the ALJ will consider this a first violation for purposes of determining an appropriate penalty. The only evidence offered concerning the income of the licensed premises came from the testimony of Mr. Southerland, though the record was left open for two weeks to allow Staff to provide controverting evidence. The ALJ will assume that the $400.00 to $500.00 figure provided by Mr. Southerland is correct.

PROPOSED FINDINGS OF FACT

1. Afterburner (Respondent) is the holder of Permit Nos. MB-247399, and LB-247400.
2. The Texas Alcoholic Beverage Commission sent a notice of hearing to Respondent dated June 19, 2000.

3. The notice of hearing contained a statement of the time, place, and nature of the hearing, a statement of the legal authority and jurisdiction under which the hearing was to be held, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.

4. The hearing was convened on September 19, 2000, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Respondent appeared and was represented by its owner, Will Southerland. Attorney Christopher Burnett represented Staff. The record was left open until October 3, 2000, to allow Staff to provide additional information concerning the income of the licensed premises.

5. On February 12, 2000, Will Southerland, the owner of Respondent, was intoxicated on the licensed premises.

6. The average gross income for the licensed premises is $400.00 to $500.00 dollars per day.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § §106.13 and 11.61(b)(2).

2. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T. CODE ANN. § 2001.

3. Service of proper and timely notice of the hearing was provided to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. § 2001 and 1 TEX. ADMIN. CODE § 155.

4. Based upon Finding of Fact No. 5 the Permittee violated TEX. ALCO. BEV. CODE ANN § 61.71 (b) (13).

5. Based on Findings of Fact Nos. 5 and 6 and pursuant to 16 TEX. ADMIN. CODE § 37.60 (Standard Penalty Chart), Respondent's permits should be suspended for 7days, and Respondent should be allowed to pay a civil penalty in the amount of $150.00 per day in lieu of suspension.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Permits should be suspended for a period of 7 days and Respondent should be allowed to pay a civil penalty in the amount of $150.00 per day in lieu of suspension.

Signed this 24TH day of November, 2000.

JOHN H. BEELER
Administrative Law Judge
State Office of Administrative Hearings

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