

DOCKET NO. 458-02-2701

**TEXAS ALCOHOLIC
BEVERAGE COMMISSION**

V.

**RAUL MALDONADO, JR.
d/b/a TROPICO INN
MAVERICK COUNTY, TEXAS**

**PERMIT NO. BE-263354
(TABC CASE NO. 597841)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against Raul Maldonado, Jr., d/b/a Tropicico Inn (Respondent) alleging that the licensee permitted the use or display of the license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license. The Respondent admitted that this offense occurred, but only for three or four months. Finding the evidence sufficient to prove that the licensee permitted the use or display of the license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license, this proposal for decision recommends Respondent's Beer Retailer's On Premise License be suspended for a period of sixty days and that respondent be allowed to pay a civil penalty of \$150.00 per day in lieu of suspension.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened before Administrative Law Judge (ALJ) Leah Davis Bates on June 12, 2002, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas and was thereafter assigned to ALJ Nancy Bage Sorenson. Staff was represented by its counsel, Dewey A. Brackin. Respondent represented himself.

II. ALLEGATIONS AND EVIDENCE

There was one allegation in this proceeding, asserting that licensee, Raul Maldonado, Jr., permitted the use or display of the license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license. Therefore, Staff alleges this misuse of the license violated TEX. ALCO. BEV. CODE ANN. § 61.71(a)(15).

A. Staff's Evidence

Staff called Agent Robert Saenz of the Texas Alcoholic Beverage Commission (TABC) as a witness. Agent Saenz testified that he was told by a reliable informant that Respondent no longer owned the Tropicco Inn, and that it was now "run by Jesse." Agent Saenz conducted an investigation and discovered that a man named Jesus Garza had been paying the beer purchase bills with his own personal account and that three checks issued from this account to BudCo had been returned for non-sufficient funds. Further investigation revealed a returned check to Coors, tendered for payment of beer bought for the Tropicco Inn by Mr. Garza. Copies of these returned checks were admitted into evidence as TABC Exhibit Four. An interview with BudCo employees revealed that they had not seen Mr. Maldonado for some time and that Mr. Garza had represented himself as the new owner.

Agent Saenz conducted an interview with Jesus Garza on June 6, 2001 and obtained a written statement from him admitted into evidence as TABC Exhibit Three. In the statement, Mr. Garza states that he purchased the bar from Raul Maldonado, Jr. in March of 2001. Mr. Garza was to pay Mr. Maldonado \$600.00 per month, in addition to paying the electricity, phone bill, bartender, and beer distributors. In return, Mr. Garza would keep all profits from the business. Mr. Garza additionally stated that Mr. Maldonado had contacted him recently to request a \$200.00 per month increase for his purchase of the bar.

Agent Saenz conducted an on-site inspection at the Tropicco Inn on July 28, 2001. The bartender on duty reported that his wages were being paid by Jesus Garza. Agent Saenz conducted an interview with Raul Maldonado, Jr. on this same date at a different location. In this interview, Mr. Maldonado denied the charges of subterfuge at this time and also refused to provide a statement. TABC Exhibit Two was offered and admitted containing the Texas Alcoholic Beverage Commission Offense Report and Narrative filed by Agent Saenz.

TABC Exhibit One was offered and admitted. Exhibit one contains a true and correct copy of the Beer Retailer's On Premise License issued by the Texas Alcoholic Beverage Commission on March 19, 1991 to Raul Maldonado, Jr. doing business as the Tropicco Inn. Exhibit one also contains the violation history of the license issued to Mr. Maldonado.

B. Respondent's Evidence

Respondent was sworn in and testified that the alleged events did happen for three to four months, but that Mr. Garza was no longer in control of the bar. Respondent acknowledged the wrongdoing and expressed remorse for his actions.

III. APPLICABLE STATUTORY PROVISIONS

TABC may either suspend a permit for not more than 60 days or cancel a permit if it is found that the permittee violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

The Code states at Section 61.71(a)(15):

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(15) permitted the use or display of his license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license.

IV. ANALYSIS AND RECOMMENDATIONS

This ALJ finds that Staff proved by a preponderance of the evidence that licensee, Raul Maldonado, Jr. doing business as Tropic Inn, permitted the use or display of the license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license in violation of TEX. ALCO. BEV. CODE § 61.71(a)(15). This ALJ recommends a sixty day suspension of Mr. Maldonado's Beer Retailer's On Premise License and that respondent be allowed to pay a civil penalty of \$150.00 per day in lieu of suspension. This is a third violation for the Tropic Inn, and while cancellation could be appropriate because this is a serious violation, a sixty day suspension is proper in this case.

V. FINDINGS OF FACT

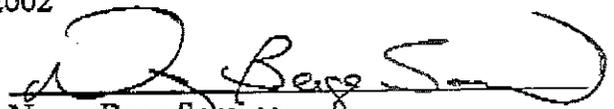
1. Raul Maldonado, Jr. (Respondent) is the holder of Beer Retailer's On Premise Permit BE-263354 for the premises known as Tropic Inn, located at 680 Main Street, Eagle Pass, Maverick County, Texas.
2. On April 26, 2002, the Staff sent the notice of hearing to Respondent by certified mail and all parties appeared.
3. The hearing on the merits was held on June 12, 2002, at the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. Staff was represented by Dewey A. Brackin. Respondent represented himself.
4. In March 2001, Raul Maldonado attempted to sell the Tropic Inn to Jesus Garza, allowing Mr. Garza the wrongful use of his Beer Retailer's On Premise License for \$600.00 a month. Mr. Garza also agreed to pay all utilities remaining in Mr. Maldonado's name, the bartender's salary, and beer distributors for beer purchases.
5. Agent Robert Saenz began his investigation on May 30, 200, after receiving information of the wrongful use of Mr. Maldonado's permit.
6. Agent Saenz interviewed Jesus Garza on June 6, 2001, and obtained a statement from him describing the agreement between himself and Mr. Maldonado.

7. Agent Saenz conducted an on site investigation at the Tropico Inn on July 28, 2001, and discovered that the bartender's salary was being paid by Jesus Garza.
8. Agent Saenz interviewed Mr. Maldonado on July 28, 2001, and he denied the subterfuge charges and refused to submit a statement.
9. Agent Saenz's investigation revealed that four dishonored checks for non-sufficient funds, issued to Beer Distributors dated various dates in March 2001, to purchase beer for the Tropico Inn, had been written out of Mr. Garza's personal account.
10. Mr. Maldonado testified at the June 12, 2002 hearing and admitted that the subterfuge occurred, but only for a three or four month period, and that it was no longer taking place.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to Chapter 5, §§ 6.01 and 61.71 of the Code.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN., Chapter 2001.
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. Staff bore the burden of proof in the proceeding.
5. Pursuant to Findings of Fact Nos. Four through Ten, Respondent violated TEX. ALCO. BEV. CODE ANN. § 61.71(a)(15), permitting the use or display of his license in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license.
6. Based on the above Findings of Fact and Conclusions of Law, a sixty day suspension of Mr. Maldonado's Beer Retailer's On Premise License is recommended. It is also recommended that Mr. Maldonado be allowed to pay a \$150.00 per day civil penalty in lieu of suspension.

SIGNED THIS 12th day of August, 2002


Nancy Bage Sorenson
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 597841

IN RE RAUL MALDONADO, JR.	§	BEFORE THE
D/B/A TROPICO INN	§	
PERMIT NO. BE-263354	§	
	§	TEXAS ALCOHOLIC
	§	
MAVERICK COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-2701)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 23rd day of September, 2002 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge (“ALJ”) Leah Davis Bates. The hearing convened on June 12, 2002, and adjourned the same day. ALJ Nancy Bage Sorenson made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 12, 2002. 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, 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, except for Conclusion of Law No. 6, which is amended for the reasons stated below:

Section 2003.042 of the Texas Government Code empowers an ALJ to issue a proposal for decision following a hearing referred to SOAH. The Government Code does not expressly authorize an ALJ to impose a sanction within the proposal for decision. Likewise, neither the Alcoholic Beverage Code nor the Texas Government Code expressly prohibit the ALJ from recommending a sanction in a proposal for decision.

The Commission is governed by Section 2001.058(e) of the Government Code in its authority to modify a finding or conclusion of an ALJ, but not a sanction recommendation. Therefore, the TABC is authorized to change an ALJ’s sanction recommendation, as appropriate punishment is within the sole discretion of the final decision maker.

The ALJ’s recommended sanction of a 60-day suspension is (1) not consistent with other sanctions imposed in cases with similar facts: and (2) too lenient to be effective.

A mixed-beverage permit is a privilege, not a right. Flagrant violations of the permit conditions warrant revocation of that privilege. Section 109.53 of the Texas Alcoholic Beverage Code states that all provisions of the Code shall be liberally construed to prevent subterfuge ownership. In prior similar subterfuge violations of the Texas Alcoholic Beverage Code, the Commission frequently cancels the violator's permit. Canceling the permit in this case is therefore consistent with other prior decisions of the Commission. Furthermore, the Commission's Penalty Chart, 16 TAC 37.60, lists cancellation as the only sanction for subterfuge operation.

Additionally, if the ALJ's recommendation were followed, there would be no real negative consequence flowing from the violations that have been found in this case. The permittee would continue to enjoy the benefits of his permit after the suspension period. Other permittees might assume that similar violations would have similar consequences. The ALJ's recommended sanction would therefore be ineffective to deter future violations by this and other permittees.

Based upon the above grounds, IT IS ORDERED that Proposed Conclusion of Law No. 6 be modified as follows:

"Based on the above findings of fact and conclusions of law Respondent's permits should be cancelled for cause."

All other 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 License No. BE-263354 is hereby **CANCELLED for CAUSE**.

This Order will become final and enforceable on October 14, 2002, 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 23rd day of September,
2002.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/dab

Raul Maldonado, Jr.

d/b/a Tropico Inn

RESPONDENT

680 Main Street

Eagle Pass, Texas 78852

CERTIFIED MAIL NO. 7001 2510 0000 7277 7347

RETURN RECEIPT REQUESTED

Administrative Law Judge

State Office of Administrative Hearings

San Antonio, Texas

VIA FACSIMILE: (210) 308-6854

Dewey A. Brackin

ATTORNEY FOR PETITIONER

Texas Alcoholic Beverage Commission

Legal Division

San Antonio District Office

Licensing Division