

DOCKET NO. 458-02-4119

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

V.

RC'S WATERING HOLE
D/B/A OLIVER'S,
Respondent

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§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

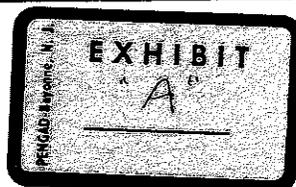
The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against RC's Watering Hole d/b/a Oliver's (Respondent). Petitioner alleged that Respondent sold an alcoholic beverage to a nonmember on the licensed premises, constituting operation of an open saloon in violation of the Texas Alcoholic Beverage Code (Code) and the Texas Alcoholic Beverage Commission Rules (Rules). Petitioner requested that Respondent's permits be suspended for a period of ten days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$1,500. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) agrees with this recommendation.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61, 32.17, and 44.03. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On September 4, 2002, Petitioner issued its Notice of Hearing, directed to RC's Watering Hole d/b/a Oliver's, 5080 IH 20 East, Willow Park, TX 76087-3200, via certified mail, return receipt requested. The Notice of Hearing was received by Respondent on September 10, 2002, as evidenced by the signature of Respondent on the return receipt. There were no contested issues of notice or jurisdiction in this proceeding.

On October 11, 2002, a hearing convened before SOAH ALJ Cindy T. Greenleaf at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared through its president, William Symonds. Evidence was received from both parties on that date. The record closed on



October 11, 2002.

II. LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under § 11.61 of the Code to cancel, or suspend for not more than 60 days, a private club registration permit if it is found that the permittee club has "sold, offered for sale, purchased, or held title to any alcoholic beverage so as to constitute an open saloon." TEX. ALCO. BEV. CODE ANN. § 32.17(a)(1). As defined in § 32.17(b) of the Code, "open saloon" is "any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption."

The Code and the Rules are very specific when defining the term "guest" for private club memberships. In § 41.49(b) of the Rules, a guest is a person known by a member or family member of the member and who is admitted to the club premises by personal introduction or who accompanies the member or family member of the member. Additionally, guests are those who accompany a member onto the club premises or are those for whom prior arrangements have been made between the member and the management of the club. See TEX. ALCO. BEV. CODE ANN. § 32.10(a). Guests are not permitted to pay for the service of alcoholic beverages made by the club. TEX. ALCO. BEV. CODE ANN. § 32.10(b).

Pursuant to § 11.64 of the Code, when a license or permit suspension is authorized, the licensee or permittee must be afforded the opportunity to pay a civil penalty in lieu of the suspension. In determining the amount of the penalty, TABC shall consider the economic impact a suspension would have on the licensee or permittee.

III. EVIDENCE AND PARTIES' CONTENTIONS

A. Respondent's Relationship with TABC

Petitioner alleged that Respondent is the holder of a Private Club Registration Permit and a Beverage Cartage Permit issued by TABC. Respondent did not dispute this allegation. Licensing records contained in TABC Exhibit Three establish that a Private Club Registration Permit, Number N-474549, and Beverage Cartage Permit, Number PE-474550, were issued to Respondent for the premises located at 5200 IH 20 East, Willow Park, Parker County, Texas on July 14, 2000.

B. Alleged Open Saloon Violation

Petitioner offered the following evidence in support of its allegation that Respondent sold an alcoholic beverage to a nonmember on the licensed premises, constituting operation of an open saloon. On March 29, 2002, TABC Agent Paul Sanchez conducted an open saloon "sting" operation at Respondent's private club (Oliver's). On March 29, 2002, Agent Sanchez was not an Oliver's

member, was not a guest of an Oliver's member, and was not a family member of an Oliver's member. When Agent Sanchez entered Oliver's, he observed an individual, later identified as William Symonds, working as bartender. Mr. Symonds is the president of Oliver's. Mr. Symonds was also operating the cash register. Mr. Symonds sold Agent Sanchez a 12-ounce bottle of Bud Light Beer, an alcoholic beverage, without determining if he was an eligible customer.¹ Agent Sanchez paid Mr. Symonds for the beer and sat at a table. Mr. Symonds pointed to a gentleman sitting at the bar and told Agent Sanchez that was his sponsor. Agent Sanchez did not personally know the gentleman, did not accompany the gentleman onto the premises of Oliver's, and was never personally introduced to the gentleman.

Respondent's witness, Curtis Lawley, testified that he is an Oliver's member and that he has never been at Oliver's when membership identification was not asked for by an employee. He stated that he occasionally volunteers to have nonmembers be his guests and pays for their drinks. He remembered volunteering his member status for a guest on the night of March 29, 2002, however, he did not recognize Agent Sanchez at the hearing. Mr. Lawley testified that he was not acquainted with Agent Sanchez, did not accompany Agent Sanchez to Oliver's, and did not make prior arrangements to have Agent Sanchez be his guest. Mr. Lawley testified that he did not pay for Agent Sanchez's drink.

C. Matters Deemed Admitted by Respondent

Additionally, Petitioner offered evidence of matters deemed admitted by Respondent, pursuant to 1 TEX. ADMIN. CODE § 155.31(d)(2). TABC Exhibit Two contains requests for admissions served on Respondent at its address of record on September 10, 2002. Respondent indicated that he did receive the requests for admissions, but did not file a response. Respondent did not request a withdrawal of the deemed admissions, and indicated that he did not object to the matters deemed admitted. The matters deemed admitted are as follows:

1. RC's Watering Hole d/b/a Oliver's, Respondent, is the holder of a private club registration permit, N 474549, and a beverage cartage permit, PE 474550, issued by the Petitioner, the Texas Alcoholic Beverage Commission, for the premises known as Oliver's, located at 5200 IH 20 East, Willow Park, Parker County, Texas.
2. The permits referenced in request 1 are currently in effect and were in effect on all dates relevant to the original, supplemental, or amended Notice of Hearing.
3. The State Office of Administrative Hearings has jurisdiction over this matter.

¹Throughout this proposal for decision, "eligible customer" includes member of the private club, family member of a member of the private club, guest of a member of the private club, temporary member of the private club, and/or guest of the private club.

4. Petitioner has jurisdiction over this matter.
5. Respondent received adequate notice of this hearing.
6. Respondent does not have good cause if these requests were answered late or not answered.
7. On or about March 29, 2002, Respondent, its agent, servant, or employee, William Symonds, did there on the licensed premises, sell, offer for sale, purchased, or held title to an alcoholic beverage, Bud Light Beer, so as to constitute an open saloon, in violation of §§ 32.17(a)(1), 32.17(b), and 11.61(b)(2) of the Texas Alcoholic Beverage Code. This violation applies to the secondary permit pursuant to Texas Alcoholic Beverage Code § 44.03.

D. Penalty Considerations

Finally, Respondent's violation history, as maintained by TABC, reveals no suspension of Respondent's permits prior to the date of this alleged violation. Respondent presented no evidence regarding the economic impact any suspension on his permits might have on his business, nor did he present evidence reflecting any mitigating circumstances involved.

IV. ANALYSIS

It is clear from the evidence, and undisputed, that Respondent holds a Private Club Registration Permit and a Beverage Cartage Permit. Further, the evidence clearly establishes that Agent Sanchez was sold alcoholic beverage for consumption at Oliver's. The ALJ must now determine whether Agent Sanchez was a permissible recipient of Respondent's alcoholic beverage sales.

On March 29, 2002, Agent Sanchez was not an Oliver's member, family member of an Oliver's member, or guest of an Oliver's member. Further, Agent Sanchez was not personally known or accompanied by an Oliver's member or respective family member, and did not make prior arrangements to be admitted onto the premises of the club. As such, he was not a guest of Oliver's. Mr. Lawley's assignment as a "volunteer" sponsor was simply a transparent attempt to circumvent the open saloon provisions of the Code. Additionally, even if Agent Sanchez was a bonafide guest, Respondent allowed him to pay for his alcoholic beverage in violation of the Code. Respondent's deemed admissions provide further evidence of its impermissible alcoholic beverage sale to Agent Sanchez. The ALJ finds that Respondent sold an alcoholic beverage to Agent Sanchez in violation of the open saloon provisions of the Code.

Petitioner requested a 10-day suspension, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$1,500. This request is an enhancement from the standard range of enforcement action for this type of violation. Petitioner argued this enhancement was proper due to

the nature of the violation in that the operational norm of this establishment shows an intent to run an open saloon and avoid the open saloon provisions of the code. The ALJ agrees that an enhancement is appropriate based on the following factors. The violation was committed by Respondent's highest ranking member, its president. Additionally, Mr. Symonds took no steps to determine if Agent Sanchez was an eligible customer. Finally, Mr. Lawley's practice of volunteering to sponsor guests whom he has never met suggests that this incident reflects standard operating procedure at Oliver's.

V. CONCLUSION AND RECOMMENDATION

The ALJ finds that Respondent violated the open saloon provisions of the Code. Based on the circumstances surrounding this violation, the ALJ recommends that a permit suspension for a period of ten days be imposed, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$1,500.

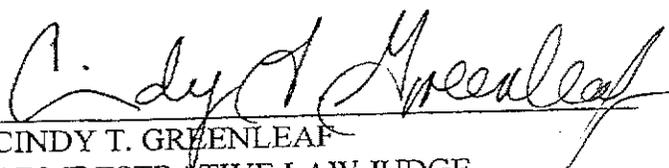
VI. PROPOSED FINDINGS OF FACT

1. RC's Watering Hole d/b/a Oliver's (Respondent) is the holder of a Private Club Registration Permit, Number N-474549, and Beverage Cartage Permit, Number PE-474550, issued by the Texas Alcoholic Beverage Commission (TABC) on July 14, 2000, for the premises located at 5200 IH 20 East, Willow Park, Parker County, Texas.
2. On March 29, 2002, Agent Paul Sanchez was not an Oliver's member, guest of an Oliver's member, family member of an Oliver's member, or guest of Oliver's.
3. On this date, William Symonds, president of Oliver's, sold an alcoholic beverage to Agent Sanchez.
4. Mr. Symonds did not take reasonable steps to determine if Agent Sanchez was an eligible customer, rather he assigned Mr. Lawley as a "volunteer" sponsor.
5. On September 4, 2002, Petitioner issued its Notice of Hearing, directed to Respondent at its address of record.
6. On October 11, 2002, a hearing convened before SOAH ALJ Cindy T. Greenleaf at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared through its president, William Symonds. Evidence was received on that date. The record closed on October 11, 2002.

VII. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61, 32.17, and 44.03.
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of hearing. TEX. GOV'T CODE ANN. §§ 2001.051, 2001.052, and 2001.054, 1 TEX. ADMIN. CODE §§ 155.25 AND 155.27.
4. Respondent operated its premises in violation of the open saloon provisions of the Code. TEX. ALCO. BEV. CODE ANN. § 32.17.
5. Respondent's Private Club Registration Permit and Beverage Cartage Permit should be suspended for ten days. TEX. ALCO. BEV. CODE ANN. § 32.17.
6. Respondent should be permitted to pay a civil penalty of \$1,500 in lieu of suspension of its permits. TEX. ALCO. BEV. CODE ANN. § 11.64.

SIGNED on this the 6th day of December, 2002.


CINDY T. GREENLEAF
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 600194

IN RE RC'S WATERING HOLE	§	BEFORE THE
D/B/A OLIVER'S	§	
PERMIT NOS. N-474549, PE474550	§	
	§	TEXAS ALCOHOLIC
	§	
PARKER COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-4119)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of January 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cindy T. Greenleaf. The hearing convened on October 11, 2002, and adjourned on October 11, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 6, 2002. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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 Permit Nos. N-474549 and PE474550 are hereby **SUSPENDED for ten (10) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,500.00** on or before the **19th day of March, 2003**, all rights and privileges under the above described permits will be **SUSPENDED for a period of ten (10) days, beginning at 12:01 A.M. on the 26th day of March, 2003**.

This Order will become final and enforceable on February 5, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 15th day of **January, 2003**.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Cindy T. Greenleaf
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

Philip H. Trew
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VIA FAX (817) 599-9417

RC'S WATERING HOLE
D/B/A OLIVER'S
RESPONDENT
5080 IH 20 E
WILLOW PARK, TX 76087-3200
CERTIFIED MAIL NO. 7001 2510 0003 8688 7350

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 600194

REGISTER NUMBER:

NAME: RC'S WATERING HOLE

TRADENAME: OLIVER'S

ADDRESS: 5200 IH 20 E., Willow Park, Texas 76087

DATE DUE: March 19, 2003

PERMITS OR LICENSES: N-474549, PE474550

AMOUNT OF PENALTY: \$1,500.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 19TH DAY OF MARCH 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.
MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed; that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.