

DOCKET NO. 564735

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
YVAN'S OFFSIDES INC.	§	
D/B/A YVAN'S OFFSIDES INC.	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB436667	§	
EL PASO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-08-0147)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of January, 2008, in the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on the 25th day of October 2007 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 19th day of December 2007. The 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 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.

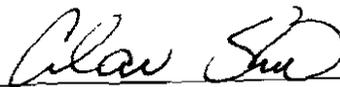
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your permit(s) are hereby **SUSPENDED**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$8,000.00** on or before the **3rd** day of **March 2008**, all rights and privileges under the above described permits will be **SUSPENDED for a period of forty (40) days, beginning at 12:01 A.M. on the 10th day of March 2008.**

This Order will become final and enforceable on 02/05, 2008, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this January 10, 2008, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

Administrative Law Judge
State Office of Administrative Hearings
El Paso, Texas
VIA FAX (915) 834-5657

Mark T. Davis
ATTORNEY FOR RESPONDENT
VIA FAX (915) 629-9691

YVAN'S OFFSIDES INC.
RESPONDENT
d/b/a YVAN'S OFFSIDES INC.
2602 N PIEDRAS
EL PASO, TX 799303505

JUDITH L. KENNISON
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 564735

REGISTER NUMBER:

NAME: YVAN'S OFFSIDES, INC.

TRADENAME: YVAN'S OFFSIDES

ADDRESS: 2602 N. Piedras, El Paso, Texas 79930-3505

DATE DUE: March 3, 2008

PERMITS OR LICENSES: MB436667, LB

AMOUNT OF PENALTY: \$8,000.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form along with your payment to:

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

Overnight Delivery Address: 5806 Mesa Drive, Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

LEGAL

SOAH DOCKET NO. 458-08-0147

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,**
Petitioner

BEFORE THE STATE OFFICE

V.

YVAN'S OFFSIDES, INC.
d/b/a Yvan's Offsides,
Respondent

OF

**EL PASO COUNTY, TEXAS
(TABC CASE NO. 564735)**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's Staff (Petitioner) brought this enforcement action against Yvan's Offsides, Inc. d/b/a Yvan's Offsides (Respondent) alleging that Respondent refilled a container that contained distilled spirits on which tax had been paid. The Administrative Law Judge (ALJ) recommends a 40 day suspension of Respondent's permit or, in lieu of suspension, payment of a \$8,000.00 civil penalty.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested issues in this proceeding. Therefore, those matters are addressed only in the Findings of Fact and Conclusions of Law.

On October 25, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901. The Petitioner was represented at the hearing by Christopher G. Gee, TABC Staff Attorney. Respondent appeared and was represented by its attorney, Mark Davis. The record closed upon adjournment of the hearing on October 25, 2007.

II. APPLICABLE LAW

The applicable law sets forth that TABC may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of this Code.¹ The Petitioner is alleging that Respondent violated section 28.08 of the Code which states that a holder of a mixed beverage permit may not refill with any substance a container which contained distilled spirits on which the tax has been paid.² Tied into the refilling prohibition, the TABC requires the invalidation of an identification stamp on a bottle immediately after it becomes empty.³ Furthermore, the agency has very specific procedures regarding the invalidation of identification stamps on empty distilled spirits bottles.⁴ All identification stamps are to be mutilated.⁵

III. EVIDENCE

Petitioner offered seven exhibits: the notice of hearing (Exhibit No. 1); the custodian of record affidavit and copy of permit number MB-436667 and two waiver orders (Exhibit No. 2); the TABC-El Paso incident report (Exhibit No. 3); photographs (Exhibit No. 4); a Bacardi rum bottle (Exhibit No. 5); a tequila bottle (Exhibit No. 6); and Southern Comfort whiskey bottle (Exhibit No. 7). All documents and items were admitted into evidence.

¹ TEX. ALCO. BEV. CODE ANN. (Code) § 11.61(b)(2) [Cancellation or Suspension of Permit].

² Code. § 28.08 [Refilling Containers Prohibited].

³ Code § 28.09 [Invalidation of a Stamp]. This section states that a permittee or any person employed by the permittee who empties a bottle containing distilled spirits on which the prescribed tax has been paid, shall immediately after emptying the bottle invalidate the identification stamp on the bottle in the manner prescribed by a rule or regulation of the commission.

⁴ The TABC's rules §§ 41.71 and 41.72 prescribe detailed procedures for the affixing and invalidation of identification stamps on bottles.

⁵ "Mutilate" means to scratch, cut, tear, or abrade in a manner which inflicts obvious and substantial damage to the stamp but does not totally remove or obliterate the stamp. See TABC's rule § 41.72(b) and (c).

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PROPOSAL FOR DECISION

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Respondent admitted to refilling distilled spirits bottles and does not contest the alleged violation. Accordingly, since the allegation is not disputed, the ALJ incorporates the facts in evidence into the Findings of Fact below. The only issue is the penalty to be assessed.

IV. ANALYSIS

The Respondent has been in operation for almost 10 years.⁶ Respondent has entered into two waiver orders during this time span.⁷ Petitioner is asking for cancellation of the permit. The ALJ does not recommend cancellation because:

- Respondent's administrative history only has two violations which are characterized as minor offenses in the agency's rules;
- This is Respondent's first violation of section 28.08 of the Code.
- The permit was issued in 1998, and has been continuously renewed without incident.⁸

Therefore, the ALJ recommends a 40 day suspension, or a \$8,000.00⁹ civil penalty, based on the fact that the current violation is a major regulatory violation, and based on the fact that Respondent was found in possession of three distilled spirits bottles on which the identification stamps were not invalidated in accordance with the Code and rules of the TABC. The Code specifies that a separate offense is committed for each bottle so possessed.¹⁰

⁶ The permit was originally issued on August 14, 1998, and has been continuously renewed.

⁷ In 2000, Respondent paid a civil penalty of \$1,050.00 for a sale to a minor violation. In 2006, Respondent paid a civil penalty of \$450.00 for the issuance of an insufficient check. See TABC Exhibit No. 2, page 3.

⁸ See TABC Exhibit No. 1.

⁹ The civil penalty is assessed at \$200.00 per day.

¹⁰ Code § 28.09(d).

V. FINDINGS OF FACT

1. Yvan's Offsides, Inc. d/b/a Yvan's Offsides currently operates under authority of a Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit, issued for the premises located at 2602 North Piedras, El Paso, El Paso County, Texas 79930.
 2. The permit was issued on August 14, 1998, and has been continuously renewed.
 3. On September 14, 2007, the TABC issued its notice of hearing directed to Respondent. There was no attorney of record at the time of the issuance.
 4. The notice 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.
 5. On October 25, 2007, a hearing convened before Administrative Law Judge Veronica S. Najera at the State Office of Administrative Hearings, located at 401 E. Franklin Avenue, Suite, El Paso, Texas 79901.
 6. The Texas Alcoholic Beverage Commission was represented at the hearing by Christopher G. Gee, TABC Staff Attorney.
 7. Respondent was represented by Mark T. Davis, attorney at law.
 8. On March 24, 2007, TABC agents conducted an inspection of Yvan's Offsides bar.
 9. During the March 24, 2007 inspection, the agents found an uninvoiced bottle of "1800 Reposado" tequila, that had:
 - a mutilated identification stamp; and
 - that was almost full with distilled spirits.
 10. During the March 24, 2007 inspection, the agents found a bottle of "Southern Comfort" whiskey bottle that had a identification stamp no. 8343972 placed on it after the label had been torn away.
 11. On March 30, 2007, as part of a follow-up to the inspection, agent Nanos recorded the level of distilled spirits in a "Bacardi" rum bottle with identification stamp no. Z00882727.
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PROPOSAL FOR DECISION

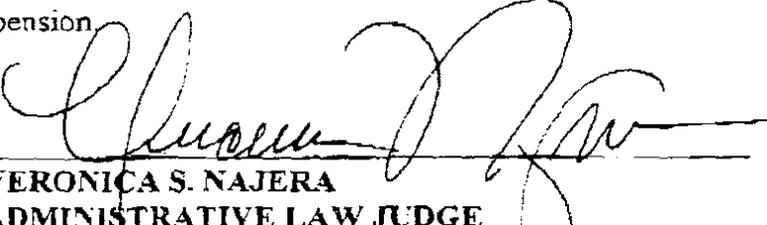
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12. On April 19, 2007, the "Bacardi" bottle with identification stamp no. Z00882727 was filled above the recorded level of March 30, 2007.
13. Respondent refilled the bottles mentioned in Findings of Fact Nos. 9, 10, and 11 with "spillage."
14. Respondent did not invalidate the identification stamps on the bottles mentioned in Findings of Fact Nos. 9, 10, and 11 in the manner prescribed by the agency.
15. The identification stamp no. 8343972 on the "Southern Comfort" whiskey bottle was not affixed in the manner prescribed by TABC, specifically because it was not affixed in such manner that some portion of the identification stamp covers and is attached to some portion of the brand label, but does not cover any information on the brand label.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.
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 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Proper and timely notice of the hearing was effected on all parties pursuant to 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63.
4. In March and April 2007, as detailed in the Findings of Fact Nos. 8-15, Respondent refilled a container that contained distilled spirits on which tax had been paid, in violation of TEX. ALCO. BEV. CODE ANN. § 28.08.
5. Respondent's permits should be suspended for 40 days, and Respondent should be allowed to pay \$8,000.00 in lieu of suspension.

SIGNED December 19, 2007.



VERONICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS