

GOV'T. CODE ANN, § 2001 *et seq.* The State Office of Administrative Hearings 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.

Notice and jurisdiction were not contested and are addressed only in the Findings of Fact and Conclusions of Law.

On June 2, 2006, a hearing convened before SOAH ALJ Rex Shaver at the SOAH office located at 2020 N. Loop West, Suite 111, Houston, Texas 77018. The Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney (Staff). Respondent appeared in person and was represented by her attorney, Robert L. Penrice. Following the presentation of evidence and argument the hearing concluded with the record remaining open for the filing of memorandum and briefs through June 16, 2006.

II. APPLICABLE LAW

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61 (b) (2) TABC may suspend or cancel a permit if it finds after notice and hearing:

[T]hat the licensee violated a provision of this code or a rule of the commission.

Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61 (b) and (b) 7 :

(b)TABC may suspend for not more than 60 day or cancel an original or renewal permit if it finds after notice and hearing any of the following are true:

(b) (7)...that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency...

III. PETITIONER'S EVIDENCE

A. Documentary Evidence:

TABC Exhibit 1: Respondent's Permit and License History Swizzle, Texas City, Texas.

TABC Exhibit 2: Application forms submitted to TABC for Swizzle in Texas City, Texas.

TABC Exhibit 3: Respondent's Permit and License History Swizzle # 2 in Galveston, Texas.

TABC Exhibit 4: Application forms submitted to TABC for Swizzles #2 in Galveston, Texas.

TABC Exhibit 5 through 17: Photographs of Swizzle #2.

TABC Exhibit 18: Contact Sheet with six photographs of the interior were admitted.

B. Testimony Regarding the Alleged Violation:

(1) Thomas Chadwick testified that in October of 2004, he was an enforcement agent with TABC and was acting in an undercover capacity investigating a complaint that Respondent was allowing gambling on the package store premises of Swizzle located at 6812 FM 1765, Texas City, Galveston County, Texas. During that investigation he and Agent Lockhart visited the package store on several occasions in the month of October, 2004.

Mr. Chadwick related that he had first come in contact with the Respondent on May 13, 2004, when he had visited the package store along with a confidential informant. They drove up to the drive in window and spoke with Ms. Achuff. The informant introduced Mr. Chadwick to Ms. Achuff and told her that she could take bets from Mr. Chadwick in the future.

On October 7, 2004, Mr. Chadwick and Mr. Lockhart went together to Swizzle to pay on a losing football wager which Mr. Lockhart had placed at Swizzle#2 a package store in Galveston. Mr. Lockhart drove up to the drive through window and paid the money to Ms. Achuff.

On October 14, 2004 Mr. Chadwick went alone to the Swizzle to pay a gambling debt owed by Mr. Lockhart. He paid the debt by driving up to the drive through window and giving the money to Ms. Achuff in an envelope with Mr. Lockhart's name written on it.

On October 28, 2004, Chadwick and Lockhart went together to Swizzle to pick up \$95.00 which Lockhart had won on a football bet. They once again drove up to the drive through window. Ms. Achuff was not working at the drive through window. The agents dealt with a clerk who identified himself as Leonard Hightower. The clerk was reluctant to pay \$95.00 to Mr. Lockhart and called someone to find out if he should make the payment. He allowed Mr. Chadwick to talk on the phone to a person whose voice the witness identified as that of Mr. David Achuff, the husband of Ms. Achuff and manager of Swizzle #2 in Galveston. Mr. Lockhart was then paid the \$95.00.

(2) Michael Lockhart testified that in October of 2004, he was an enforcement agent with TABC and was acting in an undercover capacity investigating a complaint that Respondent was allowing gambling on the package store premises of Swizzle, located at 6812 FM 1765, Texas City, Galveston County, Texas. During that investigation he had occasion to visit the premises of Swizzle.

On October 7, 2004, he went to the Swizzle along with Agent Chadwick. While there he paid a gambling debt from a football game on which he had placed a bet. When placing the bet he had been told to pay any losses at the Swizzle. Mr. Chadwick told Ms. Achuff that he was "Mike"

and he had something for “Dave”. He paid the money to Ms. Achuff through the drive in window. Respondent told him her name was “Dottie” and that she was Mr. Achuff’s wife.

Mr. Lockhart testified that he never placed a bet at Swizzle but that was the location for payment of a gambling debt or receiving winnings.

IV. RESPONDENT’S EVIDENCE

A. Documentary Evidence:

The Respondent did not present any documents.

B. Testimony

Doreen Chow Achuff, Respondent, testified that she is the holder of the TABC permits for the package store, Swizzle located at 6812 FM 1765, Texas City, Texas. She thought that the money being exchanged was a result of loans from Eric Harrison to various individuals. People would give her money in a bag or sometimes an envelope with the persons name on the outside. She stated that Mr. Harrison would come by the Swizzle and she would give the money to him. She never asked Mr. Harrison what the money was for. She did this as a favor to Mr. Harrison. When asked if she had given out betting sheets she responded, “I gave out sheets.”

Ms. Achuff gave testimony regarding the operation of Swizzle in Texas City and of Swizzle #2 in Galveston. Only that portion of her testimony relating to Swizzle has been considered in arriving at this decision. Her testimony regarding Swizzle #2 in Galveston, Texas will be considered when reaching a decision in the TABC docket number 613441, TABC v. Doreen Chow Achuff d/b/a Swizzle #2.

V. ANALYSIS

The undisputed testimony of Mr. Chadwick and Mr. Lockhart was that they placed all their bets at some other location but paid losses and collected winnings at the Respondent’s package store.

These transactions took place over the period of one month. On one occasion Ms. Achuff was not present but her clerk Mr. Hightower was able to make the payment after making a phone call. This indicates that paying out money to customers instead of receiving payment for goods sold was not an unusual situation at the Swizzle package store.

Ms. Achuff testified that she did collect and pay out sums of money from the drive through window of her package store. She would give the money collected to Eric Harrison. She also stated that she gave out betting sheets to people who came to her place of business. She further testified that she never asked Mr. Harrison what the money was for. The ALJ is not persuaded that Ms. Achuff believed that the money was for loans to Mr. Harrison's friends.

It is clear that Respondent was, at least, allowing her package store to be used as a gambling place in a manner that warrants cancellation or suspension based on the general welfare, peace morals of the people and on the public morals.

VI. PROPOSED FINDINGS OF FACT

1. Doreen Chow Achuff d/b/a Swizzle (Respondent) holds Package Store Permit, P-205720, which includes the Local Distributor's Permit, and Beer Retailer's Off-Premise License BF-241330, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 6812 FM 1765, Texas City, Texas.
2. The permit and license were issued by the Texas Alcoholic Beverage Commission on the 16th day February, 1989, and have been continuously renewed.
3. On April 18, 2006, TABC issued its notice of hearing directed to Respondent at the mailing address provided by Respondent.
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. Notice and jurisdiction were not contested.
5. On June 2, 2006, a hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge Rex Shaver at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Harris County, Texas.

6. Petitioner was represented at the hearing by Sandra Patton, TABC Staff Attorney. Respondent appeared in person and by attorney, Robert L. Penrice Jr.
7. On June 2, 2006, following presentation of evidence and argument of counsel, the hearing was included and the record remained open through June 16, 2006 for filing of memoranda and briefs after which time the record would close.
8. On October 7, 2004 ,October 14, 2004, and October 28, 2004, Respondent received and paid out sums of money at the package store in furtherance of a gambling scheme.
9. Respondent held the money collected and gave it to Eric Henderson.
10. Respondent gave out betting sheets to persons who came to the package store.

VII. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter is found in. SUBCHAPTER B OF Ch. 5, §§ 22.01 and 11.61 *et seq.* of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. §1.01 *et seq.* and the Texas Administrative Procedures Act § 2001.
2. 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. TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. CH. 2001, and 1 TEX. ADMIN. CODE § 155.55. Notice and jurisdiction were not contested.
4. On October 7, 2004 ,October 14, 2004, and October 28, 2004, Respondent received and paid out sums of money at the package store in furtherance of a gambling scheme therefore keeping a gambling place on the licensed premises in a manner that warrants cancellation or suspension based on the general welfare, peace, morals and safety of the people and on the public morals in violation of Section 11.61(b)(7) of the Texas Alcoholic Beverage Code
5. By distributing betting sheets on the licensed premises Respondent was keeping a gambling place on the licensed premises as a gambling place in a manner that warrants cancellation or suspension based on the general welfare, peace, morals and safety of the people and on the public morals in violation of Section 11.61(b)(7) of the Texas Alcoholic Beverage Code

6. The ALJ agrees with the Staff recommendation that Respondent's permits and licenses be suspended for 45 days and that the Respondent be allowed to pay \$9,000.00 in lieu of suspension. TEX. ALCO. BEV. CODE ANN. § 61.71 (a) (1) and 16 TEX. ADMIN. CODE § 37.60.

SIGNED August 15, 2006.

**REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**