

DOCKET NO. 584830

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE
	§	
	§	
VS.	§	
	§	
LESTEL'S INC.	§	
D/B/A HENRY WAYNE'S BAR, Respondent	§	TEXAS ALCOHOLIC
PERMIT/LICENSE NO(s). MB192702, LB & PE	§	
	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-0533)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this 3rd day of May 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Timothy Horan, presiding. The hearing convened on December 4, 2009 and the record was closed on same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on January 21, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent shall pay a civil penalty in the amount of **\$9,000.00** on or before **May 11, 2010**. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above license or permit by the Code will be **SUSPENDED** beginning at 12:01 A.M. on **May 19, 2010** and shall remain suspended for **thirty (30) days**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on May 27th, 2010, unless a Motion for Rehearing is filed before that date.

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

SIGNED this the 3rd day of May
2010 at Austin, Texas



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

Judge Timothy Horan
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearing
2010 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

Lestel's Inc.
d/b/a Henry Wayne's Bar
RESPONDENT
13802 Kensington Place
Houston, Texas 77034
VIA U.S. REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Houston District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 584830

REGISTER NUMBER:

NAME: LESTEL'S, INC.

TRADENAME: HENRY WAYNE'S BAR

ADDRESS: 937 FM 1959, HOUSTON, TEXAS 77034

DUE DATE: MAY 11, 2010

PERMITS OR LICENSES: MB192702, LB & PE

AMOUNT OF PENALTY: 9,000.00

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 with your payment to:

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., 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.

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

January 21, 2010

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: Docket No. 458-10-0533; Texas Alcoholic Beverage Commission v. Lestel's Inc. d/b/a Henry Wayne's Bar

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy Horan", is written over a horizontal line.

Timothy Horan
Administrative Law Judge

TH/rlm
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with exhibits and cd)
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Lestel's Inc. d/b/a Henry Wayne's Bar, 13802 Kensington Place, Houston, TX 77034 -**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-10-0533

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
 Petitioner	§	
	§	
V.	§	OF
	§	
LESTEL’S, INC.,	§	
D/B/A HENRY WAYNE’S BAR.	§	
 Respondent	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 584830)	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Lestel’s, Inc., d/b/a Henry Wayne’s Bar (Respondent), alleging that the Respondent possessed alcoholic beverages on the licensed premises which were not covered by invoice. Petitioner requested that the Respondent’s permit be suspended for 30 days, or in lieu of suspension, that the Respondent be allowed to pay a civil penalty in the amount of \$9,000. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) finds Petitioner proved its allegations. The ALJ agrees and recommends that the Respondent’s permit be suspended for 30 days and that the Respondent be allowed to pay a civil penalty in the amount of \$9,000 in lieu of suspension.

I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

TABC has jurisdiction in this case under TEX. ALCO. BEV. CODE ANN. (the Code) ch. 5 and §§ 11.61, 28.06, and 16 TEX. ADMIN. CODE (TAC) (the Rules) §41.50. 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. (the Code) ch. 2003.

On October 5, 2009, Petitioner issued its notice of hearing, directed to Respondent at his address of record. 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, as required by TEX. GOV'T CODE ANN. § 2001.052.

On December 4, 2009, a hearing convened before SOAH ALJ Timothy Horan at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Texas. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Lestel Cox, owner of Henry Wayne's Bar, appeared and represented himself. Following presentation of evidence, the record closed on December 4, 2009.

II. APPLICABLE LAW

No holder of a mixed beverage permit may knowingly possess or permit to be possessed on the licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.¹ "Premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.² The law requires the Commission or administrator to cancel, after notice and hearing, the permit of any permittee found by the Commission or administrator to have violated § 28.06 (c) of the Code.³ Pursuant to the Code, Petitioner may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or the Rules.⁴

Invoice is defined as an instrument issued by the seller of the alcoholic beverages to a

¹ § 28.06(c) of the Code.

² § 11.49(a) of the Code.

³ § 28.06(d) of the Code.

⁴ § 11.61(b)(2) of the Code.

permittee.⁵ An invoice must be issued in original and one copy in consecutively numbered order, showing the date of the sale or distribution, the purchaser and his address, the quantity, brand and class of alcoholic beverages sold, and the total price of each brand and class shown thereon. The invoice or a copy of it must be delivered to the permittee and a copy must be kept by the seller making the invoice.⁶ Each invoice must be kept on the licensed premises for a period of 2 years and must be made available to a representative of the Commission upon reasonable request.⁷

III. EVIDENCE

A. Respondent's Permit

Respondent holds a Mixed Beverage Permit, MB-192702, with accompanying Mixed Beverage Late Hours Permit and beverage Cartage Permit, issued by TABC, for the premises known as Henry Wayne's Bar and located at 937 FM 1959, Houston, Harris County, Texas. This permit was originally issued on July 3, 1987, and it has been continuously renewed.

B. Possession of Alcoholic Beverages on the Licensed Premises Not Covered by Invoice

On January 3, 2009, TABC Agent Sherk conducted a routine inspection at Respondent's licensed premises. During this inspection, Agent Sherk observed several bottles of Cook's Champagne sitting in the sink and in the refrigerator. Agent Sherk asked the bartender, Kimberly McIntosh, if she could supply the invoices for the several bottles of Cook's Champagne. She could not produce any invoices. Agent Sherk had her attempt to contact Lestel Cox, the owner of the bar, by phone, but she was unable to contact him. Agent Sherk then issued her a citation for the

⁵ § 41.50(a)(2) of the Rules.

⁶ § 41.50(h)(1) of the Rules.

⁷ § 41.50(h)(2) of the Rules.

uninvoiced bottles of champagne.

A month later, Agent Sherk went back to the bar, and received an envelope from Lestel Cox, which contained a receipt for the Cook's Champagne. Mr. Cox had placed the receipts in a storage shed located in Manvel, Texas. Agent Sherk testified that Mr. Cox had purchased the champagne from Sam's Club for New Year's Eve and that Sam's Club is not an authorized supplier.

Harriet Cox, wife of Lestel Cox, testified that her husband was ill during the end of 2009 and that she was trying to help run the bar. Her husband told her to purchase the champagne from Sam's Club for New Year's Eve because they did not have time to order it from an authorized supplier. She stated that they gave the champagne away at the bar as part of a complimentary celebratory toast for the New Year. Ms. Cox testified that she and her husband knew that the champagne was not purchased from a proper source and not invoiced per the Code and Rules.

IV. ANALYSIS

The evidence clearly establishes that the Respondent knowingly possessed alcoholic beverages on the licensed premises which were not covered by invoice. The Code and the Rules require that the permittee purchase alcoholic beverages from an authorized supplier and is required by law to maintain the invoices on the premises for two years.⁸ This clearly was not done by the Respondent.

V. RECOMMENDATION

Petitioner requested that the Respondent's permit be suspended for 30 days, or in lieu of suspension, that the Respondent be allowed to pay a civil penalty in the amount of \$9,000. The ALJ finds Petitioner proved its allegations. The ALJ recommends that Respondent's permit be suspended

⁸ § 41.50(h)(2) of the Rules.

for 30 days and that Respondent be allowed to pay a civil penalty in the amount of \$9,000 in lieu of suspension.

VI. FINDINGS OF FACT

1. Lestel's Inc. d/b/a Henry Wayne's Bar (Respondent) holds a Mixed Beverage Permit, MB-192702, with accompanying Mixed Beverage Late Hours Permit and beverage Cartage Permit, issued by TABC, for the premises known as Henry Wayne's Bar and located at 937 FM 1959, Houston, Harris County, Texas.
2. This permit was originally issued on July 3, 1987, and it has been continuously renewed.
3. On January 3, 2009, TABC Agent Sherk conducted an inspection at Respondent's licensed premises.
4. Bottles of alcohol (Cook's Champagne) observed by Agent Sherk were not covered by invoice.
5. On October 5, 2009, TABC staff (Petitioner) issued its notice of hearing, directed to the Respondent at his address of record.
6. 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.
7. On December 4, 2009, a hearing convened before SOAH ALJ Timothy Horan at the SOAH field office located at 2020 North Loop West, Suite 111, Houston, Texas. Petitioner was represented at the hearing by Ramona Perry, TABC Staff Attorney. Lestel Cox, owner of Henry Wayne's Bar, appeared and represented himself. Following presentation of evidence, the record closed on December 4, 2009.

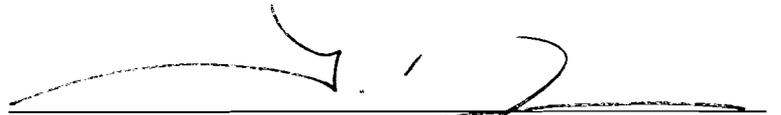
VII. CONCLUSIONS OF LAW

1. Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to Chapter 5 and §§ 6.01, 11.61, 28.06 and 28.09 of the Code, as well as 16 TEX. ADMIN. CODE (TAC) §§ 41.50 and 41.72 of the TABC Rules (the Rules).
2. SOAH has jurisdiction over all matters related 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.

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. The Respondent knowingly possessed or permitted to be possessed on the licensed premises alcoholic beverage which were not covered by an invoice, in violation of § 28.06(c) of the Code.
5. Based on the foregoing, the Respondent's permits should be suspended for a period of 30 days, or in lieu of any suspension, the Respondent pay a civil penalty in the amount of \$9,000.

SIGNED January 21, 2010.



TIMOTHY HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS