

DOCKET NO. 619131

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
HUETAMO ENTERPRISES INC. D/B/A HUETAMO SPORTS BAR, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT/LICENSE BG639517, BL	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-13-5721)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 16th day of May, 2014, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Bennie Brown presiding. The hearing convened on November 1, 2013 and the SOAH record closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 16, 2013. 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. No exceptions were filed.

At page 4 of the Proposal for Decision, the Administrative Law Judge states:

Respondent requests mitigation of the assessed penalty and requests a 10 – 14 day suspension or a civil penalty. A civil penalty, however, is not appropriate in this case as it is prohibited by [Alcoholic Beverage] Code §11.64(a).

However, Code §11.64(a) does not *prohibit* the assessment of civil penalties when the basis of the suspension is after-hours consumption. That section provides that in such cases "the commission or administrator shall determine whether the permittee or licensee may have the

opportunity to pay a civil penalty rather than have the permit or license suspended." The general rule is that when suspension is authorized, the permittee or licensee must be allowed the opportunity to pay a civil penalty in lieu of the suspension. Certain specific violations (including after-hours consumption as prohibited in Chapter 105 of the Code) are excluded from this general requirement. In those cases, as here, the Administrator/Executive Director [see Code §5.11(b)] has discretion as to whether to allow a civil penalty in lieu of suspension.

In this case, I believe a 30-day suspension without the possibility of paying a civil penalty is the appropriate sanction. Two violations for this offense occurred within two months. When confronted, Gustavo Alvarez (the sole officer and shareholder of the permittee/licensee) stated that he was aware that he was violating the Code. He defended the violations by saying that it was the only way to compete with other businesses in the area that serve after legal hours. [Proposal for Decision, page 3] Allowing payment of a civil penalty under these circumstances would be tantamount to tolerating the violations and letting the penalty just be charged off as a cost of doing business rather than functioning as a deterrent to future violations.

After review and due consideration of the Proposal for Decision, and with the following exception only, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

Conclusion of Law No. 5, for the reasons stated herein, is modified to read as follows:

Based on the foregoing findings of fact and conclusions of law, Respondent's permit should be suspended for a period of 30 days without the possibility of payment of a civil penalty in lieu of the suspension. Alcoholic Beverage Code §§11.64(a), 25.04(b) and 61.71.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that the privileges granted by the Commission and activities authorized under the above permit and license by the Code will be **SUSPENDED beginning at 12:01 A.M. on June 17, 2014** and shall remain suspended for **THIRTY (30)** consecutive days, without the possibility of paying a civil penalty in lieu of the suspension.

If this Order is appealed and judgment is issued affirming the Order, the privileges granted by the Commission and activities authorized under the above permit and license by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18th)** day following the date the judgment is signed and shall remain suspended for **THIRTY (30)** consecutive days, without the possibility of paying a civil penalty in lieu of the suspension.

This Order will become **final and enforceable** on the 10th day of June, 2014, **unless a Motion for Rehearing is filed by the 9th day of June, 2014.**

SIGNED this the 16th day of May, 2014, at Austin, Texas.



Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 16th day of May, 2014.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

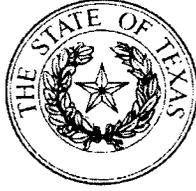
Bennie Brown
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

Huetamo Enterprises Inc.
d/b/a Huetamo Sports Bar
RESPONDENT
13315 Noble Crest Drive
Houston, Texas 77041
VIA FIRST CLASS MAIL, CMRRR # 70120470000133009504

Clyde W. Burlison
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1533 W Alabama Street, Suite 100
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AND
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Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: ramona.perry@tabc.state.tx.us

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 16, 2013

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-13-5721; Texas Alcoholic Beverage Commission vs. Huetamo Enterprises Inc. d/b/a Huetamo Sports Bar

Dear Ms. Cook:

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "B. Brown".

Bennie Brown
Administrative Law Judge

BB/cj
Enclosure

xc Ramona Perry, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008 - **VIA REGULAR MAIL**
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - **VIA REGULAR MAIL**
Huetamo Enterprises Inc. d/b/a Huetamo Sports Bar; 13315 Noble Crest Drive; Houston, Texas 77041 - **VIA REGULAR MAIL**

2020 North Loop West, Suite 111, Houston, Texas 77018
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SOAH DOCKET NO. 458-13-5721

(TABC CASE NO. 619131)

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
	§	
v.	§	
	§	OF
	§	
	§	
HUETAMO ENTERPRISES INC. D/B/A HUETAMO SPORTS BAR PERMIT/LICENSE NO(s): BG639517, BL HARRIS COUNTY, TEXAS, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Huetamo Enterprises, Inc. d/b/a Huetamo Sports Bar (Respondent), alleging that Respondent permitted consumption of alcoholic beverages on its premises during prohibited hours in violation of Texas Alcoholic Beverage Code (Code) §§ 105.06, 61.71(a)(18), 61.71 (a)(1), and 25.04(b). Staff recommended Respondent’s permit be suspended for 30 days. Respondent did not contest the allegation but sought mitigation of the penalty to be assessed and requested a 10-14 day suspension or civil penalty. The Administrative Law Judge (ALJ) recommends that Respondent’s permit be suspended for 30 days.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The hearing in this matter convened on November 1, 2013, before State Office of Administrative Hearings (SOAH) ALJ Bennie Brown. Ramona M. Perry, Staff Attorney, represented Staff at the hearing. Clyde W. Burluson, attorney, represented Respondent. The hearing concluded and the record closed the same day.

There are no contested issues of notice or jurisdiction in this case. Therefore, notice and jurisdiction are addressed only in the findings of fact and conclusions of law.

II. ALLEGATION AND LEGAL STANDARDS

In its Notice of Hearing, Staff alleged that on or about March 9, 2013, Respondent or Respondent's agent, servant, or employee permitted an alcoholic beverage to be consumed on the permitted premises at a time when the consumption of alcoholic beverages is prohibited in violation of Code §§ 105.06, 61.71(a)(18), 61.71 (a)(1), and 25.04(b).

The Code provides that a permit may be cancelled or suspended if it is found, after notice and a hearing, that the permittee consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited.¹ A late hour's permit prohibits the consumption of any alcoholic beverages between 2:15a.m. and 7:00a.m. on any day except Sunday. On Sunday, the prohibited hours are between 2:15a.m. and noon.²

III. DISCUSSION

On September 18, 2011, TABC issued a Wine and Beer Permit BG 639517, which included an on premise late hours license, for Respondent's premises located at 13315 Noble Crest Drive, Houston, Harris County, Texas 77041. Gustavo Alvarez is the sole officer and shareholder of Huetamo Enterprises, Inc.

On March 9, 2013, at approximately 4:30a.m., TABC Enforcement Agents Christopher Rodriguez and Peter Gonzales entered Respondent's premises to deliver notice for an administrative hearing. Upon arrival, Agent Rodriguez observed approximately fifteen vehicles in the parking lot. The front door of the building was lit by a flood light.

¹ Code § 61.71(a)(18).

² Code § 105.06.

Agent Rodriguez testified that the establishment appeared to be open for business. After entering the building, the agents heard loud music playing and observed several people sitting at the bar with red plastic cups in front of them. Mr. Alvarez was behind the bar and had a clear view of the patrons at the bar. Agent Rodriguez photographed the bar area.³

Agent Gonzales observed three patrons drinking at the bar and identified them. All three patrons told Agent Gonzales that they had recently purchased beer at the bar and admitted drinking the beer out of red plastic cups. Agent Gonzales observed an amber liquid with foam on top inside the cups. Agent Gonzales conveyed this information to Agent Rodriguez.

Agent Rodriguez spoke with Mr. Alvarez in a back room behind the bar and observed coolers containing beer and ice. Mr. Alvarez told Agent Rodriguez that he knew serving alcohol after-hours was a code violation but explained that it was the only way he could compete with other businesses in the area that serve after-hours. Agent Rodriguez served Mr. Alvarez with an administrative notice for permitting after-hours consumption. Agent Rodriguez stated that Mr. Alvarez was very cooperative and truthful about his actions.

Agent Rodriguez testified that Mr. Alvarez had previously been served an administrative notice on January 18, 2013, for permitting after-hours consumption at the same location. Agent Gonzales testified that bars serving after-hours were placed on a priority list with TABC.

IV. RECOMMENDATION

The evidence establishes that Respondent violated the Code by serving alcohol after-hours. Respondent's late hour's permit allows the sale of alcohol until 2:15a.m. At 4:30a.m., on March 9, 2013, Agents Rodriguez and Gonzales observed patrons drinking beer inside Respondent's establishment. Three patrons admitted recently purchasing the beer. Mr. Alvarez

³ TABC Ex. 3, 4, and 6.

was present and admitted to Agent Rodriguez that he knew he was violating the Code by serving after-hours.

Section 11.61 of the Code states that the TABC may suspend a license for up to 60 days or cancel a permit for any single violation. The statute does not establish a minimum suspension period.

Respondent requests mitigation of the assessed penalty and requests a 10-14 day suspension or a civil penalty. A civil penalty, however, is not appropriate in this case as it is prohibited by Code § 11.64(a).⁴ Alternatively, Respondent requests a 10-14 day suspension pursuant to the standard penalty chart.⁵ Respondent argues that the suspension period should be mitigated because other bars in the area serve after hours and Respondent experienced financial pressure to do the same. The ALJ does not find Respondent's argument persuasive. Violating the Code simply because it is more profitable to do so or because other entities are doing the same does not justify or mitigate Respondent's actions.

The TABC requests that Respondent's permit be suspended for 30 days. The evidence shows that Mr. Alvarez violated the Code on two separate occasions by serving alcohol during prohibited hours. After being cited in January 2013, Mr. Alvarez was on notice that he had violated the Code and was placed on a priority list for public safety violations. Despite being on notice, Mr. Alvarez committed the same violation just two months later. Respondent was given an "opportunity to show compliance with all requirements of law" and failed to do so.⁶ For these reasons, the ALJ concludes that the suspension period recommended by Staff is reasonable under the circumstances. Therefore, the ALJ recommends that Respondent's permit be suspended for 30 days.

⁴ Code § 11.64(a) prohibits the payment of a civil penalty when the basis of the suspension is after-hours consumption.

⁵ In 16 Texas Administrative Code Ch. 34, the TABC has adopted a standard penalty chart to be used to settle a complaint. It includes a maximum penalty range. However, Chapter 34 does not apply to a contested case brought under the Administrative Procedures Act, Texas Government Code Ch. 2001.

⁶ Texas Government Code § 2001.504(c).

V. FINDINGS OF FACT

1. Huetamo Enterprises, Inc. d/b/a Huetamo Sports Bar (Respondent) holds a Wine and Beer Permit BG 639517, which includes a Late Hours License, for the premises located at 13315 Noble Crest Drive, Houston, Harris County, Texas 77041.
2. On March 9, 2013, Respondent or Respondent's agent, servant, or employee permitted an alcoholic beverage to be consumed on the permitted premises during prohibited hours.
3. On January 18, 2013, Respondent was served an administrative notice for permitting alcohol consumption during prohibited hours.
4. On August 7, 2013, Staff of the Texas Alcoholic Beverage Commission (TABC) issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
5. The hearing convened on November 1, 2013, before State Office of Administrative Hearings (SOAH) Administrative Law Judge Bennie Brown. Staff was represented by attorney Ramona M. Perry. Respondent was represented by attorney Clyde W. Burleson. The hearing concluded and the record closed the same day.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code (Code) Chapter 5 and § 11.61.
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 Texas Government Code Chapter 2003.
3. Notice of the hearing was provided as required by Texas Government Code §§ 2001.051 and 2001.052.
4. Respondent violated Code §§ 105.06, 61.71(a)(18), 61.71 (a)(1).
5. Based on the foregoing findings of fact and conclusions of law, Respondent's permit should be suspended for a period of 30 days. Code § 11.61.

SIGNED December 16, 2013.

A handwritten signature in black ink, appearing to read 'B. Brown', written over a horizontal line.

BENNIE BROWN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS