

State Office of Administrative Hearings



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HARRIS COUNTY
LEGAL

Cathleen Parsley
Chief Administrative Law Judge

January 29, 2015

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-4699; Texas Alcoholic Beverage Commission vs. Spooky-Lou Inc. d/b/a Tobins? (TABC Docket No. 625660)

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 that reads "S. Burger".

Stephen Burger
Administrative Law Judge

SB/cj
Enclosure

xc Sandra K. Patton, 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
Clyde Burleson, Burleson & Craig P.L.L.C., 1533 West Alabama, Suite 100, Houston, Texas 77006 - VIA REGULAR MAIL

II. LEGAL STANDARDS AND APPLICABLE LAW

The commission may suspend or cancel a permit if a permittee has violated a provision of the Code or made a false or misleading statement in connection with its original or renewal application or any other instrument relating to the application. Code § 11.61 (b)(2), (b)(4).

No person shall sell, warehouse, store or solicit orders for any liquor in any wet area without first having procured a permit of the class required for such privilege, or consent to the use of or allow his permit to be displayed by or used by any person other than the one to whom the permit was issued. It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices.... Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.¹

No permittee may consent to or allow the use or display of its permit by a person other than the person to whom the permit was issued. Code § 11.05.

III. EVIDENCE

A. Petitioner's Witnesses

1. Christopher Rodriguez

Christopher Rodriguez is an enforcement agent with the TABC. In August 2013, Petitioner received an anonymous complaint regarding possible subterfuge regarding the ownership of Respondent's bar. The permit was issued in 2012, with Craig Nightingale listed as the president, secretary, director, and sole shareholder. Mr. Nightingale had asserted that he received \$45,000 to fund the corporation from his father, and that Mr. Nightingale intended to pay his father back from proceeds of the bar. However, Agent Rodriguez stated there is no

¹ Code § 109.53.

evidence that Mr. Nightingale has made any payments to his father.

Agent Rodriguez referenced the following information from Petitioner's exhibits. As of December 18, 2013, a CPA wrote a letter that tax returns for 2011 and 2012 for Spooky-Lou Inc. would be completed once necessary documentation was received from Mr. Nightingale. To Agent Rodriguez's knowledge, no income tax records from Respondent were received by Petitioner, and Respondent paid no federal income taxes.

The lease agreement for the bar's premises was signed by Tobin Murtagh in March 2012. Mr. Murtagh signed a document on July 8, 2012, as Spooky-Lou's *president*, naming himself as the authorized agent to represent the corporation to the Texas Workforce Commission. In August 2012, Mr. Murtagh signed as Respondent's *president* the document authorizing him as the "taxpayer or authorized representative" with ADP, a tax filing service. Mr. Murtagh also signed as General Manager the internet contract for the corporation, and he signed without delineating his position the cable communications agreement. A citation dated May 22, 2013, was issued to Mr. Murtagh as *owner* from the Harris County Public Health Division for the bar having no permit to operate a food service store. Mr. Murtagh's name appears in the "Tenant's Notice Address" portion of Respondent's lease, and on March 16, 2012, Mr. Murtagh signed a Guaranty of Lease. Mr. Nightingale did sign an insurance document. Respondent's bank records showed that Mr. Nightingale and Mr. Murtagh had signed signature cards with Amegy Bank.

Agent Rodriguez had contacted several distributors who made alcohol deliveries to the bar. Mr. Murtagh was listed having authorization to order alcoholic beverages from Spec's, Silver Eagle, Republic, and Houston distributors. A James Womac was also listed for Republic. Mr. Nightingale was not listed for any of the distributors.

Mr. Nightingale had admitted to Agent Rodriguez that Mr. Murtagh received about \$104,000 plus about \$40,000 in salary, which included payments of \$1,916 per month in mortgage payments on Mr. Murtagh's home. Mr. Nightingale did not know what the \$104,000 paid to Mr. Murtagh was for, except that \$15,000 was for a bonus. Many of the checks

to Mr. Murtagh were signed by Mr. Murtagh and he was an authorized signator at the bank. Mr. Nightingale admitted he himself made about \$22,000 from March 2012 to December 2013. Mr. Nightingale told Agent Rodriquez that he was a "silent" partner in the business, and that Mr. Murtagh ran the day-to-day operation, but he insists he nevertheless has a lot of control over the business.

Agent Rodriguez discovered that Mr. Murtagh owed \$156,000 to the State Comptroller for taxes owed by Nibet, Inc., a company he owned that had filed for Chapter 7 Bankruptcy in April, 2013. Apparently that debt was discharged by the Order Discharging Debtor dated August 27, 2014.

Mr. Murtagh was the president of Nibet, Inc., which in November 2009 had its permit cancelled for cause because of the delivery of alcohol to an intoxicated person which resulted in a death. This cancellation and the taxes owed to the State of Texas would have made Mr. Murtagh ineligible to apply for a permit in 2012. Agent Rodriguez also stated that when a permit is canceled because of a sale to an intoxicated person, there is no set limit on how long the TABC could protest the violator's future applications.

Agent Rodriguez's review of requested records found that Mr. Murtagh and James Brame have known each other since about 2000. Agent Rodriguez stated that his investigation revealed that Mr. Nightingale has been a personal trainer for Pro-Am Services, Inc., a vending company owned by Mr. Brame, for about 20 years. Mr. Brame received from Respondent \$120,000 between March 2012 and December 2013. There is no documentation explaining why Mr. Brame received the \$120,000, and Mr. Nightingale informed Agent Rodriguez that he did not know what the \$120,000 was for, although Agent Rodriguez admitted that it could have been for vending machine rentals. Mr. Nightingale admitted Mr. Brame was his boss in another job. In the interview with Agent Rodriguez, Mr. Nightingale was not prepared to discuss any of the checks that were written on the bar's account.

Petitioner's records show that Mr. Murtagh and Mr. Brame were listed as officers of a bar called Westfield's, whose permit was issued in July 2000, and expired in July 2003. Both

Mr. Murtagh and Mr. Brame were also listed as officers of a bar called Tobin's, whose permit was issued in October 2003 and expired in October 2009.

Agent Rodriguez admitted that as president of Respondent, Mr. Nightingale is the only person who can renew Respondent's permit, and Mr. Nightingale is responsible for sales and income taxes. Agent Rodriguez also conceded that Mr. Nightingale may hire anyone to run his bar, can pay them as he wishes and could fire Mr. Murtagh. Agent Rodriguez admitted that Mr. Nightingale may give bonuses and permit others to run his business. The proposed Sales Agreement stated the funds from the sale of the business would flow to Mr. Nightingale. According to the formal documents, Mr. Nightingale is in control of the relationship between himself and Mr. Murtagh. Agent Rodriguez also stated Respondent has no other TABC violations. Agent Rodriguez said that a bankruptcy proceeding would not preclude Mr. Murtagh from acquiring a permit. Agent Rodriguez conceded that Mr. Murtagh guaranteeing the lease in itself does not prove a subterfuge violation of the TABC Code. However, based on his investigation, Agent Rodriguez believes that Mr. Murtagh is "running the business."

2. Sheryl Jaehne

Sheryl Jaehne is an enforcement officer with the Texas Comptroller's Office. She has reviewed tax records and stated that as of November 2010, Mr. Murtagh owed about \$200,000 in taxes to the State of Texas. Because of the tax owed, Mr. Murtagh would not have been issued an alcoholic beverage permit. Ms. Jaehne is aware that \$160,000 of the tax debt was discharged by the bankruptcy court in 2014.

B. Respondent's Witness

1. Craig Nightingale

Mr. Nightingale is the president, secretary, and director of Respondent. The original permit was issued on July 31, 2012. Mr. Nightingale testified that he had been and still is a personal fitness trainer, and has worked for a vending machine company, Pro-Am Services Inc.,

owned by Mr. Brame. Income from the bar is not his only income. This apparently was his first foray into the bar business and he stated simply that “he wanted to get into the business.” Mr. Nightingale testified that he has known Mr. Murtagh for 15 years and he has considerable respect for Mr. Murtagh’s experience in the bar business. Mr. Nightingale has other businesses and he relies upon others such as Mr. Murtagh to run the bar. Mr. Murtagh was in charge of the day-to-day management of the bar.

Mr. Nightingale stated he has control of the business. He is liable for taxes, only he can renew the permit, and he can withdraw bar funds as he sees fit. He further stated that Mr. Murtagh is authorized to write checks on the bar’s bank account with no limitations. He acknowledged that Mr. Murtagh was paying his home mortgage from bar funds, but that was “ok” by Mr. Nightingale. However, Mr. Murtagh has no shares in the business, and Mr. Nightingale could fire him.

As to the \$120,000 paid to Mr. Brame, Mr. Nightingale stated that the payment was for vending machines, tables, 8-liners, dart boards and video games (about 10 to 15 total machines) provided by Mr. Brame’s company. Mr. Nightingale asserted Mr. Brame has no control over the bar.

Mr. Nightingale stated that in regard to a prospective sale of the bar, he had hoped to make a profit, and that Mr. Tobin had no claim on any such profit. Mr. Nightingale made between \$22,000 and \$24,000 per year from the bar. He also stated the bar made approximately \$150,000 to \$300,000 per month, with expenses running from \$75,000 to \$175,000 per month.

C. Documentary Evidence

The documentary evidence generally comports with the testimony of the witnesses. However, the ALJ takes note of the following evidence contained in the documents.

- There is a May 16, 2012 letter signed by Mr. Nightingale and his father, Carlin Nightingale, referencing the \$45,000 loan from the elder Mr. Nightingale to his son.

- In the renewal application of Respondent dated July 14, 2014, prior year or projected yearly sales were estimated at \$2,100,000 for alcoholic beverages and \$143,000 for food sales.
- The March 16, 2012 lease agreement for Respondent's premises states that the Tenant's Notice Address was for "Tobin Murtagh."
- The Purchase and Sales Agreement which was not consummated stated the proposed purchase price for Respondent's bar was \$850,000.
- The income records show that Mr. Murtagh received about \$37,500 from the bar as wages from July 2012 to December 2013.
- On Respondent's Renewal Application dated July 14, 2014, Mr. Nightingale answered "No" to the question: Is this application being made by you for the benefit of someone else?

IV. ANALYSIS

The Texas legislature made it clear that the law against subterfuge in the selling of alcoholic beverages should be liberally construed to carry out that intent, and that the Commission must strictly adhere to a policy preventing subterfuge ownership. While subterfuge is not defined specifically in the Code, its common meaning is defined as a trick or device used to conceal, escape, or evade, and is synonymous with fraud or deception². Staff argues that Mr. Murtagh, who is not eligible for a permit due to owing back taxes to the state and having had a permit canceled for cause, has control of the business, and Mr. Nightingale is merely a "front." The ALJ finds more than sufficient evidence by a preponderance standard that Mr. Murtagh is in virtually total control of the business and is deriving considerable funds in excess of any managerial duties.

Mr. Nightingale testified that he was new to the bar business, and therefore relies upon Mr. Murtagh in virtually all aspects of the business. While he asserts that the \$45,000 to start the business was loaned to him by his father, no promissory note was admitted in evidence, nor was there any evidence that any payments were made to Mr. Nightingale's father. The ALJ finds this

² See Merriam-Webster Dictionary, New Edition.

suspicious, but in itself it would not be sufficient evidence of subterfuge. Although Mr. Nightingale asserts that he is in control of the business, being liable for taxes, etc., his testimony clearly shows he knows little of the operation of the bar. He stated that he depends on Mr. Murtagh to run the day-to-day operation of the bar. The evidence shows Mr. Murtagh's name appears on at least four of Respondent's contracts and agreements, including one where Mr. Murtagh lists himself as "President" of Respondent.³ This alone may be enough to show that Mr. Nightingale has surrendered control of the employees, premises or business to someone else not listed anywhere on the permit application, in violation of the Code. Mr. Nightingale is not listed as a purchaser of alcoholic beverages on any of the distributors' records.

There is insufficient evidence that Mr. Nightingale has any idea who the employees are who work at the bar. In his interview with Agent Rodriguez, Mr. Nightingale could not explain what many of the checks he wrote on the bar's account were for, including the \$104,000 dollars that was paid to Mr. Murtagh, except that a portion may have been as a "bonus." Additionally, Respondent provided very little accounting information on the bar's operation, and information was never provided to the bar's CPA on which to file tax returns for 2011 and 2012.

Importantly, the evidence shows that Mr. Murtagh, the individual Mr. Nightingale has allowed to run the business, was not eligible to have a permit such as Respondent's by virtue of having owed taxes to the state and having a permit canceled for cause because of a sale of liquor to an intoxicated person, which apparently resulted in a death. Allowing Mr. Murtagh so much control over a bar under these circumstances is clearly a violation of Texas law preventing subterfuge ownership.

As further evidence of subterfuge, Mr. Murtagh received a total of about \$145,000 from Respondent, of which about \$40,000 was listed as salary. Included in that amount were checks written in the exact amount of Mr. Murtagh's personal home mortgage. Furthermore, Mr. Nightingale is an employee of Mr. Brame, who also has a history of operating bars. Records show that Mr. Brame received \$120,000 from Respondent's checking account. Mr. Nightingale

³ The ALJ notes the obvious coincidence that the bar under consideration in this case is called Tobins?, and Mr. Murtagh's first name is Tobin.

believes this amount may have been for vending and gaming machines used at the bar, but no evidence was submitted supporting that claim. On the renewal application, the amounts listed for bar income only mentioned alcohol sales and food sales, with no mention of any vending or game proceeds. These payments are further evidence of subterfuge, considering Mr. Nightingale only received \$22,000 to \$24,000 from March 2012 to December 2013.

Although many of the specific transactions and circumstances taken by themselves would not necessarily be sufficient evidence to find a subterfuge violation, when viewed together they provide more than sufficient evidence of subterfuge.

In summary, Mr. Nightingale, who has no history in the bar business, gives control of the bar operation including total access to the bar's income to his long-time friend Mr. Murtagh, who has a long history of owning bars, but who cannot get a permit. Mr. Nightingale pays Mr. Murtagh \$140,000 and pays Mr. Brame, Mr. Nightingale's employer who is not listed on Respondent's permit, \$120,000, while Mr. Nightingale's income from the bar is only about \$22,000 per year. Furthermore, Mr. Nightingale cannot account for most of the hundreds of thousands of dollars the bar is generating yearly. It is clear to the ALJ that Mr. Murtagh has for all intents and purposes acquired almost all the benefits and attributes of Respondent's permit. After considering all the evidence, Staff has proven a TABC subterfuge violation.

V. RECOMMENDATION

The ALJ recommends that Respondent's permit be canceled.

VI. FINDINGS OF FACT

1. Spooky-Lou Inc., d/b/a Tobins? (Respondent) is the holder of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 15444 FM 529, Houston, Harris County, Texas 77095.
2. On September 12, 2014, a Notice of Hearing was sent to the Respondent which contained a statement of the location and the 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 allegations and the relief sought by the TABC.

3. On December 4, 2014, a public hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger in Houston, Texas. The TABC appeared at the hearing and was represented by Sandra Patton, Staff Attorney. Respondent was represented by Attorney Clyde Burlison. Evidence was received and the record closed on the same date.
4. On Respondent's Renewal Application of July 14, 2014, Craig Nightingale answered "No" to the question: Is this application being made by you for the benefit of someone else?
5. Mr. Nightingale is listed as the president, secretary, and director of Respondent and holds a Mixed Beverage Permit, MB-815292, and a Mixed Beverage Late Hours Permit issued on July 31, 2012.
6. Prior year or projected yearly sales for Respondent listed on its 2014 Renewal Application was \$2,100,000 for alcoholic beverages and \$143,000 for food.
7. Mr. Nightingale had no experience in the bar business prior to 2012.
8. Mr. Nightingale has known Tobin Murtagh for about 15 years.
9. Mr. Murtagh was listed as an officer on three TABC permits prior to 2012: Nibet, Inc., whose permit was cancelled for cause in November 2009 because of the delivery of alcohol to an intoxicated person; Westfield's, whose permit expired in July 2003; and Tobin's, whose permit expired in October 2009.
10. In November 2010, Mr. Murtagh owed about \$200,000 in taxes to the State of Texas.
11. Because Nibet, Inc.'s permit was cancelled for cause, and because he owed money for taxes due to the State of Texas, the TABC would not have issued a permit or license to Mr. Murtagh in 2012 or 2014.
12. Mr. Murtagh runs the day-to-day operation of Respondent's bar.
13. Mr. Nightingale knows little of the day-to-day operation of Respondent's bar.
14. Mr. Murtagh's signature appears on Respondent's bank checking signature card.
15. On July 8, 2012, Mr. Murtagh signed as president of Respondent on a Texas Workforce Commission authorization, and in August 2012, Mr. Murtagh signed as the taxpayer or authorized representative with ADP, a tax filing service.
16. On November 5, 2012, Mr. Murtagh signed Respondent's lease agreement and

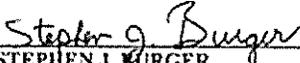
Respondent's internet service contract.

17. Mr. Murtagh had authority to order alcohol for Respondent from distributors.
18. Mr. Murtagh received about \$145,000 from Respondent in 2012 and 2013, of which about \$40,000 was for wages. Numerous payments from Respondent's checking account were to pay Mr. Murtagh's personal home mortgage.
19. Mr. Nightingale received \$22,000 to \$24,000 per year from proceeds of the bar.
20. James Brame owns Pro-Am Services, a vending and game rental company, and has employed Mr. Nightingale.
21. Respondent paid Mr. Brame \$120,000 in 2012 and 2013, but there is no documentation what the funds were for.

VII. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter. Tex. Alco. Bev. Code (Code) ch. 5 and § 11.61.
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law. Code § 5.43; Tex. Gov't Code ch. 2003.
3. Proper notice of the hearing was provided to all parties pursuant. Tex. Gov't Code §§ 2001.051-052.
4. Respondent's President, Mr. Nightingale, made a false or misleading statement in connection with an original and renewal application. Code § 11.61(b)(4)
5. Respondent allowed its permit to be used for persons other than Respondent. Code §§ 11.05 and 109.53.
6. Respondent surrendered control of the employees, premises or business of Respondent to persons other than Respondent. Code § 109.53.
7. Respondent's permit should be cancelled. Code § 11.61(b)(2).

SIGNED January 28, 2015.


STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 625660

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
	§	
VS.	§	
	§	
	§	
	§	
SPOOKY-LOU INC. D/B/A TOBINS?, Respondent	§	ALCOHOLIC
	§	
	§	
	§	
PERMIT MB815292, LB	§	
	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-4699)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 2nd day of June, 2015, 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 Stephen Burger presiding. The hearing convened on December 4, 2014 and the SOAH record closed the same day. The Administrative Law Judge filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on January 29, 2015. 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.

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

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 Respondent's Mixed Beverage Permit MB 815292, and the associated Mixed Beverage Late Hours Permit, are hereby **CANCELLED**.

This Order will become final and enforceable on the 26th day of June, 2015, unless a Motion for Rehearing is filed by the 25th day of June, 2015.

SIGNED this the 2nd day of June, 2015, 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 2nd day of June, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

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

Spooky-Lou Inc.
d/b/a Tobins?

RESPONDENT

15444 FM 529

Houston, TX 77095

VIA FIRST CLASS MAIL, CMRRR # 70090960000121490820

Clyde Burleson

ATTORNEY FOR RESPONDENT

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Sandra Patton

ATTORNEY FOR PETITIONER

TABC Legal Division

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