

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
May 18, 2015

Received
MAY 17 2015
ADMINISTRATIVE
MAIL

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-15-1645; Texas Alcoholic Beverage Commission vs. Fulgencio Del Rio d/b/a Silver Boys (TABC Docket No. 628139)

Dear Ms. Cook:

Please find enclosed a Nunc Pro Tunc 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 M. 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**
Albert T. Van Huff, Monshaugen & Van Huff, 1225 North Loop West, Ste 640; Houston, TX 77008-1757 -**VIA REGULAR MAIL**

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

Staff alleged that on or about February 20, 2014, Respondent consented to or allowed the use of his permit by a person other than the person to whom the permit was issued in violation of Code §§ 61.71(a)(1), 25.04(b), and 11.05.²

The Code provides that a permit may be cancelled or suspended if it is found, after notice and a hearing, that the permittee violated a provision of the Code or the Commission's Rules.³ The provisions regarding cancellation and suspension apply to a wine and beer retailer's permit.⁴ A permittee may not consent to or allow the use or display of his permit by someone other than the person to whom the permit was issued.⁵

III. DISCUSSION

A. Background Information and Parties' Contentions

Respondent holds a Wine and Beer Retailer's On Premise Permit, BG808393, and a Retail Dealer's On Premise Late Hours License issued by TABC to Fulgencio Del Rio d/b/a Silver Boys, located at 8031 Harrisburg, Houston, Harris County, Texas 77012.

Staff asserts that Respondent participated in a subterfuge operation of the above-listed premises because he consented to or allowed the use or display of his permit by someone other than himself. Specifically, Staff asserts that Respondent entered into a business agreement with

² The Notice of Hearing contained a second allegation against Respondent; however, Staff withdrew the second allegation at the hearing.

³ Code § 61.71(a)(1).

⁴ Code § 25.04(b).

⁵ Code § 11.05.

Jose Garcia and Marla Centeno for the purchase of the permitted premises and the use Respondent's alcohol permit in violation of the Code.

Respondent argues that he did not improperly allow the use of his alcohol permit because he never relinquished control or ownership of the permitted premises. Rather, Respondent contends that Mr. Garcia and Ms. Centeno managed the business until they could obtain their own alcohol permit.

B. Evidence

1. Business and Rental Agreements

In February 2014, Respondent entered into a business agreement with Mr. Garcia and Ms. Centeno for the purchase of his bar. In the agreement, Mr. Garcia and Ms. Centeno were designated as "Business buyers," and Respondent was designated as "Business owner."⁶

The agreement allowed the Buyers to take over the permitted premises and to keep all business profits as long as certain conditions were met. Those conditions included paying rent and taxes and following all city, state, and federal laws. The Buyers were required to transfer all business licenses, city permits, occupancies, and sales tax permits into their names by April 30, 2014. If any of the listed requirements were not met, the Owner had the right to forfeit the business relationship. The agreement also states that once all licenses, permits, accounts, tax permits, and city permits had been transferred into the Buyer's name, the agreement would cease to exist and only the rental agreement would remain in force. The agreement was signed by all parties and notarized on February 11, 2014.⁷

⁶ TABC Ex. 3.

⁷ TABC Ex. 3.

The parties signed a second business agreement on February 20, 2014.⁸ The second business agreement is identical to the first agreement except an additional term was added requiring the Buyers to pay \$4,000 to the Owner by April 20, 2014.

The parties also entered into a rental/sublease agreement for a period of 17 months, beginning on February 24, 2014, and ending on July 24, 2015. According to the agreement, Mr. Garcia and Ms. Centeno agreed to pay Respondent \$3,800 per month to lease the permitted premises and certain inventory, such as plasma televisions, cash registers, tables, and chairs. The rental agreement was signed by all parties and notarized on February 11, 2014.⁹

2. Jose Garcia

Mr. Garcia testified that he and Ms. Centeno entered into an agreement with Respondent to purchase the permitted premises and to use Respondent's beer-and-wine permit to operate the business. Mr. Garcia stated that he took over the business in February 2014 and started using Respondent's permit at that time.

Mr. Garcia testified that he made several cash payments to Respondent for the sale of the business and rental of the property. According to Mr. Garcia, he paid Respondent \$2,000 on February 12, 2014, pursuant to the business agreement. On February 27, 2014, Mr. Garcia paid Respondent \$11,400 pursuant to the rental agreement. This amount included the first and last month's rent and a security deposit. Mr. Garcia testified that he also paid Respondent \$4,000 on March 7, 2014. Mr. Garcia did not obtain any receipts for these payments but testified that his wife, Ms. Centeno, and the notary were present when the money was paid to Respondent.

Mr. Garcia testified that he made improvements to the permitted premises by installing new flooring, projectors, and televisions and purchasing an LED sign.¹⁰ Mr. Garcia testified that he operated the business and worked everyday in the evening. He used Respondent's permit to

⁸ Respondent Ex. 11.

⁹ TABC Ex. 4.

¹⁰ TABC Ex. 9.

purchase alcohol every Thursday and paid money from his own bank account to the delivery driver.¹¹ Mr. Garcia stated that he kept the cash profits from the business but explained that he did not have an account set up for credit card transactions. As a result, those transactions were deposited into Respondent's bank account. According to Mr. Garcia, Respondent withdrew the amount of money from the credit card transactions and deposited them into Mr. Garcia's bank account. Mr. Garcia was not an authorized signer on Respondent's bank account.

Mr. Garcia testified that he intended to rename the business "Silver Star" and had filed paperwork to that effect in March 2014. Mr. Garcia also said he would have continued to use Respondent's permit had he not been advised by the TABC that the practice was illegal.

3. Marla Centeno

Mr. Garcia is married to Ms. Centeno's sister, Elda Castro. Ms. Centeno testified that although she signed the business agreement with Mr. Garcia and Respondent, Mr. Garcia was the business owner and she was the bartender.

Ms. Centeno testified that the business agreement was not contingent upon Mr. Garcia obtaining his own permit. Rather, Ms. Centeno explained that she and Mr. Garcia took over the business when they signed the agreement and began using Respondent's permit to operate the business. According to Ms. Centeno, there was an inventory of alcohol on the premises when she and Mr. Garcia took over the business. They purchased the alcohol from Respondent and also purchased new alcohol with their own funds.

Ms. Centeno explained that the credit card transactions were deposited into Respondent's bank account because he owned the credit card machine. Ms. Centeno stated that they totaled the credit card transactions, compared it to amount of rent owed, and paid Respondent the difference. Ms. Centeno also testified that a bank account was eventually opened under the Silver Star name.

¹¹ TABC Ex. 13.

4. Elda Castro

Ms. Castro testified that she was present when Mr. Garcia, Ms. Centeno, and Respondent entered into the business agreement. Ms. Castro testified that Respondent was paid \$1,250 in cash for the inventory of alcohol already on the premises. Ms. Castro also stated that Mr. Garcia and Ms. Centeno paid for the purchase of additional alcohol from the distributor and made purchases for the bar including flooring, lighting, glasses, cups, and non-alcoholic beverages.

Ms. Castro testified that the business agreement was effective immediately and was not dependent upon Mr. Garcia obtaining his own alcohol permit. Ms. Castro testified that a business debit account was opened under the Silver Star name and she was authorized to sign on the account.

5. Agent Brenda Garcia

Agent Garcia is an enforcement agent with the TABC. She testified that Staff began an investigation against Respondent after receiving a complaint from a local business owner. The complaint alleged that Respondent had offered to sell his permit and his business.

On April 17, 2014, Agent Garcia and her partner went to Respondent's premises to investigate the allegation. Upon their arrival, the agents were advised by Ms. Centeno that Respondent was in Mexico on family business. Ms. Centeno also said that Mr. Garcia was the current owner of the bar.

Agent Garcia testified that she initiated an investigation and interviewed Respondent, Mr. Garcia, Ms. Centeno, Ms. Castro, the landowner of the permitted premises, and the notary listed on the business agreements. At the conclusion of her investigation, Agent Garcia determined that Respondent had sold his business and the use of his permit to Mr. Garcia and Ms. Centeno in violation of the Code. Agent Garcia explained that even if the deal between the parties did not close until the end of April, Respondent had still violated the Code because he

allowed Mr. Garcia and Ms. Centeno to run the business and use his permit during the 3-month period from February 2014 to April 2014.

6. Respondent

Respondent testified that he entered into the business agreement with Mr. Garcia and Ms. Centeno for the purchase of his bar. However, Respondent understood that Mr. Garcia and Ms. Centeno would not take possession of the property as owners until they obtained an alcohol permit in their own name. According to Respondent, Mr. Garcia and Ms. Centeno managed the business for Respondent while he was away in Mexico due to a family emergency.

Respondent stated that he only received \$2,000 from Mr. Garcia and Ms. Centeno per the business agreement. Respondent believed the deal between the three of them would not close or become final until April 30, 2014, when Mr. Garcia was required to transfer all licenses and permits into his name.

Respondent asserted that he never relinquished ownership of the permitted premises. As proof of ownership, he offered copies of the bank statements and utility bills for Silver Boys during the months of February, March, and April 2014.¹² The bank statements and utility bills were in Respondent's name. The bank statements reflect cash and credit card deposits from the sale of alcohol at Silver Boys, according to Respondent. Respondent added that money was never taken out of the bank account to pay Mr. Garcia, but Ms. Centeno was paid \$80 per day in cash for her services as a bartender.

IV. ANALYSIS AND RECOMMENDATION

Staff of the TABC alleges that Respondent violated the Code by allowing the use of his alcohol permit by someone other than himself. Specifically, Staff asserts that Respondent

¹² Respondent Ex. 3-8.

entered into a business agreement with Mr. Garcia and Ms. Centeno for the purchase of Respondent's business and the use Respondent's alcohol permit.

Respondent argues that he did not improperly allow the use of his alcohol permit because he did not relinquish ownership of the business. Respondent contends that Mr. Garcia and Ms. Centeno merely managed the business until they could obtain their own alcohol permit. According to Respondent, the business agreement was not final until Mr. Garcia obtained an alcohol permit in his name.

The ALJ finds that the written agreements between the parties are the best representation of the parties' intent. The business and rental agreements contemplate the sale of Respondent's business, not the management of his business. There is no evidence that Respondent paid Mr. Garcia or Ms. Centeno any salary for managing the business. On the contrary, Mr. Garcia made cash payments to Respondent for the purchase of the business and the lease of the property. Mr. Garcia and Ms. Centeno also used their own funds to make improvements to the business by purchasing new flooring, installing televisions and projectors, and purchasing inventory.

Although Respondent argues that the business agreement was not effective until Mr. Garcia obtained his own alcohol permit, the business agreement does not contain any language to that effect. In fact, the agreement states that once all licenses and permits are transferred into the buyers' names, the business agreement will cease to exist.

The preponderance of the evidence, therefore, establishes that Respondent violated the Code by allowing someone other than himself to use his alcohol permit. The business and rental agreements were signed in February 2014. Mr. Garcia and Ms. Centeno took possession of the property and began operating the business with Respondent's permit that same month. Mr. Garcia and Ms. Centeno acted as owners of the business, and Respondent allowed them to use his permit in the operation of the business from February 2014 to April 2014.

For these reasons, the ALJ finds that Respondent violated Code § 11.05 and recommends that Respondent's permit be cancelled for cause.

V. FINDINGS OF FACT

1. Fulgencio Del Rio d/b/a Silver Boys (Respondent) holds a Wine and Beer Retailer's On Premise Permit, BG808393 and a Retail Dealer's On Premise Late Hours License issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 8031 Harrisburg, Houston, Harris County, Texas 77012.
2. In February 2014, Respondent entered into two business agreements with Jose Garcia and Marla Centeno for the purchase of the permitted premises. The business agreements allowed Mr. Garcia and Ms. Centeno to take possession of the permitted premises and to keep all business profits.
3. Respondent also entered into a rental/sublease agreement with Mr. Garcia and Ms. Centeno for a period of 17 months, beginning on February 24, 2014, and ending on July 24, 2015.
4. Mr. Garcia and Ms. Centeno agreed to pay Respondent \$3,800 per month for the lease of the permitted premises and certain inventory including plasma televisions, cash registers, tables, and chairs.
5. On February 12, 2014, Mr. Garcia paid Respondent \$2,000 pursuant to the business agreement.
6. On February 27, 2014, Mr. Garcia paid Respondent \$11,400 pursuant to the rental/sublease agreement. This amount included the first and last month's rent and a security deposit.
7. On March 7, 2014, Mr. Garcia paid Respondent \$4,000.
8. Mr. Garcia and Ms. Centeno took possession of the permitted premises in February 2014 and began operating the business with Respondent's alcohol permit.
9. Mr. Garcia and Ms. Centeno used their own funds to make improvements to the business by purchasing new flooring and installing televisions and projectors.
10. Mr. Garcia and Ms. Centeno used Respondent's permit to purchase alcohol for the business.
11. Mr. Garcia and Ms. Centeno acted as owners of the business and Respondent allowed them to use his alcohol permit from February 2014 to April 2014.

12. On December 30, 2014, Staff of the 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.
13. The hearing convened on March 20, 2015, 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 Albert Van Huff. 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 consented to or allowed the use or display of his permit by someone other than the person to whom the permit was issued. Code § 11.05.
5. Respondent violated a provision of the Code §§ 25.04(b), 61.71(a)(1).
6. Based on the foregoing findings of fact and conclusions of law, Respondent's permit should be cancelled for cause. Code §§ 25.04(b), 61.71(a)(1).

SIGNED May 18, 2015.



BENNIE BROWN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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 Wine and Beer Retailer's Permit BG808393, and the associated Retail Dealer's On Premise Late Hours License, are hereby **CANCELLED**.

This Order will become final and enforceable on the 1st day of December, 2015, unless a Motion for Rehearing is filed by the 30th day of November, 2015.

SIGNED this the 5th day of November, 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 5th day of November, 2015.



Bennie Brown
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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VIA FACSIMILE: (512) 322-2061

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