DOCKET NO. 458-05-3082

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
YELLOW DOG SALOON	§	
N-252980 & PE-252981	§	
EASTLAND COUNTY, TEXAS	§	
(TABC CASE NO. 600862)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against Yellow Dog Saloon (Respondent), alleging that Respondent has engaged in the following violations of the Texas Alcoholic Beverage Code (the Code): consenting or allowing its permits to be used or displayed by another;[1] entering into a device, scheme or plan that surrendered control of the premises to a person or persons other than Respondent;[2] and failing to maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises.[3] TABC Staff seeks cancellation of Respondent's permits.[4] The Administrative Law Judge (ALJ) recommends that Respondent's permits be canceled.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.05, 11.61, 44.01, 44.03, and 109.53 (the Code), and 16 TEX. ADMIN. CODE § 31.1

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[1]No permittee may consent to or allow the use or display of his permit by a person other than the person to whom the permit was issued. TEX. ALCO. BEV. CODE ANN. §§ 11.05 and 109.53.

[2]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. TEX. ALCO. BEV. CODE ANN. § 109.53.

[3]Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. TEX. ALCO. BEV. CODE ANN. § 109.53.

[4]The Texas Alcoholic Beverage Commission is authorized to cancel or suspend a permit for not more than 60 days if a permittee violates the Code. TEX. ALCO. BEV. CODE ANN. §§ 11.61

EXHIBIT A

et. seq. (the Rules). 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 findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021. There were no timely contested issues of notice or jurisdiction in this proceeding.

On June 20, 2003, a hearing convened before ALJ Tanya Cooper, in the SOAH offices, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented by counsel, Paul W. Lewallen, Attorney at Law. The record closed on that same date.

EVIDENCE

Respondent holds a Private Club Registration Permit, N-252980, and Beverage Cartage Permit, BE-252981, issued by TABC to Yellow Dog Saloon, 11800 IH 20, Eastland, Eastland County, Texas. TABC Staff alleges that Respondent participated in a subterfuge in the operation of its business because it consented or allowed the use or display of its permits by another person; entered into a device, scheme or plan that surrendered control of the premises to another; and failed to maintain exclusive occupancy and control of the entire licensed premises in every phase of the sale of alcoholic beverages on the licensed premises.

Agent A. Williamson testified on behalf of TABC Staff. He was the only witness called in this proceeding by either party. He is a Texas peace officer and has been employed as a TABC agent for sixteen years. During his tenure, he said that he had conducted subterfuge investigations.

Agent Williamson stated that Yellow Dog Saloon (Yellow Dog) is a private club being operated by Linda Beggs. According to Agent Williamson, Ms. Beggs has been involved in the operation of private clubs for several years, having operated another private club, The Inn Club, at another location prior to becoming involved with Yellow Dog's operation. Agent Williamson felt that Ms. Beggs was well-versed on the rules associated with the proper operation of private clubs and was aware that strict record keeping requirements applied to these type of business entities from her previous experience. He testified further that he was present at a meeting in November 2001, when Ms. Beggs had been specifically cautioned about using money belonging to a private club for her personal use by a representative of the State Comptroller's Office, Larry Howard.

Agent Williamson said that he reviewed Yellow Dog's bank records and found that on February 25, 2002, a check in the amount of $194.11 had been written on Yellow Dog's bank account to the Eastland National Bank, which was for payment on Ms. Beggs' car loan. Agent Williamson also said that he observed other checks written on Yellow Dog's operating account to J.C. Penny and Sears, which he thought were questionable as Yellow Dog business expenditures and were likely given to pay for Ms. Beggs' personal purchases.

Ms. Beggs' income tax return was examined by Agent Williamson. Her return showed that

she was claiming income as a club operator, in which the club, Yellow Dog, was designated as a sole proprietorship. Using Schedule C in her tax return, Ms. Beggs had written off business expenses from Yellow Dog's operations personally.

According to Agent Williamson this was improper. Agent Williamson testified that Yellow Dog was a legal entity, whose existence must be recognized because it was the holder of TABC permits. As a result, Yellow Dog should be filing its own income tax return under its own taxpayer identification number. Business expenses incurred by Yellow Dog should be reflected on its tax return, rather than on the personal tax return of the private club's operator or manager.

In Agent Williamson's opinion, these two factors demonstrated that the Yellow Dog's ownership or operation was a subterfuge and illegal. He said that TABC Staff had been willing to work with Ms. Beggs and assist her with proper record keeping, but that she had continued mixing her personal business affairs with that of the private club, Yellow Dog. Ms. Beggs failed to set up a management agreement with the club's membership, as suggested, so that she could receive compensation for her work. Ms. Beggs had confirmed to Agent Williamson that no management agreement ever existed between herself and Yellow Dog.

Agent Williamson discounted the suggestion that Ms. Beggs' activities were merely clerical errors, since she had received warnings concerning using Yellow Dog's operating account to pay for personal debts. In summary Agent Williamson concluded his testimony saying that Ms. Beggs had admitted to him that she was "broke" and needed to use money from Yellow Dog's operating bank account to pay her bills.

ANALYSIS

A private club is an association of persons, whether unincorporated or incorporated, organized for the promotion of some common object. The association is managed by a committee or board made up of members of the club, and no employee of the club shall be eligible to serve on this committee or board. [*See* TEX. ALCO. BEV. CODE ANN. § 32.03] A private club registration permit authorizes alcoholic beverages belonging to members of the club to be stored, possessed, and served for on-premises consumption only to members of the club, their families, or their guests. [*See* TEX. ALCO. BEV. CODE ANN. § 32.01]

A private club registration permit allows members of the club to combine resources and implement a pool system for storage of its alcoholic beverages. Provisions of Section 32.06 of the Code allow for charging service fees in order to replenish the private club's stock of alcoholic beverages. The establishment of specific accounts, such as a general operating account, is provided for pursuant to Section 32.06 of the Code, and any of these accounts are required to be maintained in accordance with generally accepted accounting principles.

Additionally, Section 32.06 of the Code allows for the membership committee or board to contract for beverage services with third party providers. These service providers are required to

maintain records for the membership and TABC under generally accepted accounting principals.

In this case, the questions which need to be examined are:

1. Did Respondent allow or consent to some one other than the permit holder using its permit;
2. Did Respondent fail to maintain exclusive control of the premises; and
3. Was Respondent a party to a device, scheme or plan that surrendered control of Respondent's business to another.

These activities are contrary to §§1[illegible].05, 1[illegible].541(a)(2), and 109.53 of the Code. Generally, these allegations are also collectively referred to as a subterfuge operation of a licensed premises. The term "subterfuge" is not defined within the provisions of the Code; however, its common meaning is defined as a deception in order to [illegible] escape, or evade; or a deceptive device or stratagem. (See Webster's Collegiate Dictionary, Tenth Edition). Further, Section 109.53 of the Code states:

> It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit of the premises covered by such a 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.

From the evidence presented, TABC Staff has met its burden of proof establishing that Respondent's permits were being used improperly. Management for a private club is, by definition, a decentralized operation. In this case, however, all club management and control activities were centralized in one individual, Linda Beggs. Ms. Beggs accepted notice of this proceeding on behalf of Respondent, she admittedly used private club monies to pay a personal debt, and claimed proceeds and expenses from operating the club as a sole proprietorship on her personal tax return. This commingling activity between Respondent and Ms. Beggs' business affairs would not fall within generally recognized accounting practices in the ALJ's opinion.

Clearly, Respondent's business was being conducted for the personal benefit of Ms. Beggs rather than the club's membership. She continued with this course of conduct despite warnings being provided to her by representatives of the State Comptroller's Office and TABC Staff. Ms. Beggs was no stranger to operating a private club, having been associated with another similar entity for several years. She was aware that proper alternatives for compensation for her services to the club were possible via a management contract, yet she took no steps to establish a proper relationship with Respondent and its membership, or implement an appropriate method for accounting of funds between herself and Respondent. For these reasons, the ALJ agrees with TABC Staff and recommends that Respondent's permits be canceled.

FINDINGS OF FACT

Yellow Dog Saloon (Respondent) holds a Private Club Registration Permit, N-252980, and a Beverage Cartage Permit, PE-252981, issued by the Texas Alcoholic Beverage Commission (TABC) for a premises located at 11800 IH 20, Eastland, Eastland County, Texas.

2. Respondent's business operations were carried out by Linda Beggs

3. Ms. Beggs has been actively involved in operating Respondent and another private club, The Iron Club, over a period of several years.

4. On February 25, 2002, a check was issued to the Eastland National Bank from Respondent's bank operating account by Ms. Beggs, which was in payment for a personal debt, Ms. Begg's car loan.

5. Ms. Beggs' personal income tax return reported Respondent's business income and expenses as being from the operation of a sole proprietorship, rather than reporting these amounts on a separate income tax return for Respondent, which would be proper since Respondent is a separate legal entity.

6. Prior to the events discussed in Findings of Facts Nos. 4 and 5, Ms. Beggs had been cautioned that proper accounting practices needed to be implemented to prevent commingling her personal business with Respondent's business affairs, but the improper activities continued.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 1 and §§ 6.01, 11.05, 11.61, 44.01, 44.03, and 109.53.

2. 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 findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Respondent received adequate notice of the proceedings and hearing.

4. Based on the foregoing Findings of Fact, Respondent's permits have been used by a person other than the one to whom the permits were issued; Respondent has failed to maintain exclusive control of the entire licensed premises in every phase of the sale of alcoholic beverages sold on the premises; and Respondent has surrendered control of the business to a person other than Respondent in violation of TEX. ALCO. BEV. CODE ANN. §§11.05,

11.61, and 109.53.

5. Based on the foregoing Findings of Fact and Conclusion of Law No. 4, Respondent's Private Club Registration Permit, N-252980, and Beverage Carriage Permit, FE-252981, should be canceled for cause.

SIGNED on this the 18th day of July 2003.

TONYA COOPER, Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 600862

IN RE YELLOW DOG SALOON	§	BEFORE THE
D/B/A YELLOW DOG SALOON	§	
PERMIT NOS. N-252980, PE252981	§	
	§	TEXAS ALCOHOLIC
	§	
EASTLAND COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-3082)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of October 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on June 20, 2003, and adjourned on June 20, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 18, 2003. This Proposal For Decision **(attached hereto as Exhibit "A")**, was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. No exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-252980, PE252981 are hereby **CANCELED FOR CAUSE.**

This Order will become final and enforceable on October 29, 2003 unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 8th day of October, 2003.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
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