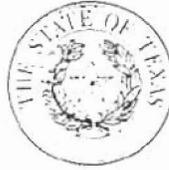


# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

June 14, 1999

Doyme Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

VIA CERTIFIED MAIL Z269 601 757

RE: Docket No. 458-98-1917; Texas Alcoholic Beverage Commission vs. Shiloh Shalom Corporation;  
d/b/a Mazzio's Pizza (TABC Case No. 571678)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Andrew del Cueto, attorney for Texas Alcoholic Beverage Commission, and to Respondent d/b/a Mazzio's Pizza. For reasons discussed in the proposal, I recommend Respondent's renewal application be denied.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark S. Richards".

Mark S. Richards  
Administrative Law Judge

MSR:fgm  
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing  
✓ Andrew del Cueto, Staff Attorney, Texas Alcoholic Beverage Commission  
Marion Marshall, P. O. Box 7934, Tyler, Texas 75711-7934

Regular Mail  
Certified Mail Z269-601-769  
Certified Mail Z269-601-770

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SOAH DOCKET NO. 458-98-1917

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

VS.

SHILOH SHALOM CORPORATION  
D/B/A MAZZIO'S PIZZA  
PERMIT NO. BG-311869 & FB-258874  
HUNT COUNTY, TEXAS  
(TABC CASE NO. 571678)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action against Shiloh Shalom Corporation d/b/a Mazzio's Pizza (Respondent) seeking to deny Respondent's application for renewal of Wine and Beer Retailer's Permit BG-311869 and Food and Beverage Certificate FB-258874. The Commission's Staff (Staff) recommended that the application be denied due to Respondent's violation of Section 69.06 of the TEX. ALCO. BEVERAGE CODE (Code), which will be set forth below. This Proposal for Decision is in agreement with the Staff's recommendation that the license and permit not be renewed.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing in this matter convened on December 1, 1998, at the offices of the State Office of Administrative Hearings in Tyler, Smith County, Texas. The Staff was represented by its counsel, Andrew del Cueto. Respondent was represented by its president and owner, Marion Ellen Marshall. Proposed Findings of Fact and Conclusions of Law were filed by the Staff on February 17, 1999.

**II. ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS**

The Commission alleges that the Permits should not be renewed because the spouse of Respondent's owner and president is presently on probation (deferred adjudication) for a felony

offense specifically precluded by the Code and has been on probation for that offense since June 3, 1993.

Section 69.06 (a)(5) of the Code provides:

“ The county judge shall deny an original application for a retail dealer’s on-premise license if he finds that the applicant or the applicant’s spouse, during the three years immediately preceding the application, was finally convicted of a felony or one of the following offenses:

- (5) An offense involving controlled substances as defined in the Texas Controlled Substances Act or other dangerous drugs.....”

Section 69.06(c)(2) of the Code provides as follows:

“ The Commission shall refuse to issue a renewal of a retail dealer’s on-premise license if it finds:

- (2) that three years has not elapsed since the termination of a sentence, parole, or probation served by the applicant or the applicant’s spouse because of a felony prosecution or prosecution for any of the offenses described in Subsection (a) of this section.”

Section 25.04 of Code provides that the provisions applicable to application, issuance, cancellation or suspension of an On-Premise license apply with equal force to a Wine and Beer Retailer’s permit.

### III. EVIDENCE AND DISCUSSION

Staff’s documentary evidence, which was admitted without objection, consisted of the Permits which were issued to Respondent on October 25, 1995, (TABC Exhibit 1), the Notice of Hearing, (TABC Exhibit 2), additional copies of the permits, application, personnel history sheet and affidavit signed by Windel B. Marshall, the spouse of Marion Ellen Marshall, detailing the circumstances surrounding his deferred adjudication (TABC Exhibit 3), and the renewal application, Order refusing same from the Commission, and explanatory letter from Marion Marshall, (TABC Exhibit 4). In addition, both Marion Marshall and Windel Marshall testified live. A condensed summary of oral and written testimony is as follows:

Windel Marshall, the spouse of Marion Marshall, was a registered pharmacist. On May 2, 1993, he pled guilty of one count of delivery of a controlled substance, having refilled a

prescription for a long-time customer without doctor's authorization. He was assessed a 10-year sentence with adjudication deferred. Thereafter, on April 15, 1995, he was married to Marion Marshall. His pharmaceutical license has been revoked and he works with his wife in her restaurants.

In August of 1995, Marion Marshall filed an application for permits for Mazzio's Pizza, (at that time operated under the name of Ken's Pizza). An attorney advised her to answer "no" to a question in the application regarding final conviction by the applicant or her spouse of an offense involving controlled substances or dangerous drugs, and based upon this advice, she also answered "no" to a question relating to probation within the last three years for any such offense. The permits were approved by the Commission and were issued on October 25, 1995.

Thereafter, on September 30, 1996, Marion Ellen Marshall applied for renewal of the permits. The application was refused by the Commission by order dated November 26, 1996, due to the probationary status of Windel Marshall, and the Commission then filed this action to deny Respondent's renewal application.

#### **IV. RECOMMENDATION**

It must be noted that all of the evidence discussed in the preceding section is uncontradicted. Marion Ellen Marshall, the owner and president of Respondent, and her spouse were both extremely credible, and after having seen and listened to them, the Administrative Law Judge cannot envision a situation arising in the future stemming from difficulties or problems of their making. However, under this state of the record, a Code infraction has occurred and the Code permits no exceptions. Therefore, the Administrative Law Judge sustains the Staff's position in this matter and recommends that Respondent's renewal application be denied.

#### **V. PROPOSED FINDINGS OF FACT**

1. On October 25, 1995, the Commission issued a Wine and Beer Retailer's Permit, Number BG-311869, and a Food and Beverage Certificate Number FB-258874 to Shiloh Shalom Corporation presently d/b/a Mazzio's Pizza, 2008 Live Oak, Commerce, Hunt County, Texas.
2. The hearing was convened on December 1, 1998, at the offices of the State Office of Administrative Hearings in Tyler, Smith County, Texas, and the Commission filed its Proposed Findings of Fact and Conclusions of Law on February 17, 1999. At the hearing, the Commission was represented by its counsel, Andrew del Cueto, and Marion Ellen Marshall, the owner and president of Respondent, was present to represent Respondent.
3. The parties stipulated that Respondent received proper and timely notice of the hearing.

4. On April 15, 1995, Marion Ellen Marshall was married to Windel Barry Marshall.
5. On April 15, 1995, and continually since that date up to the present time, Windel Barry Marshall was on probation, (deferred adjudication), for the felony offense of Delivery of a Controlled Substance.
6. Since April 15, 1995, up to the present date, Windel Barry Marshall has continued to be the spouse of Marion Ellen Marshall.
7. On September 30, 1996, Respondent applied for renewal of its permits.

#### V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to subchapter (b) of Chapter 5 of the TEX. ALCO. BEV. CODE (Vernon 1995).
2. The State Office of Administrative Hearings has jurisdiction to conduct the Administrative hearing in this matter and to issue a Proposal for Decision containing Finding of Fact and Conclusions of Law pursuant to TEX. GOV'T. CODE ANN. CH 2003 (Vernon 1997).
3. Based upon Findings of Fact Numbers 5, 6 and 7, Respondent applied for renewal of its permit/license when three years had not elapsed since the termination of probation of the spouse of Respondent's owner and president because of a felony offense specified in TEX. ALCO. BEV. CODE SECTION 69.06.
4. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. Sections 2001.051 and 2001.052 (Vernon 1997).
5. Based on the foregoing Findings and Conclusions, Respondent's renewal applications should be denied.

Signed this 14 day of June, 1999

  
Mark S. Richards, Administrative Law Judge  
State Office of Administrative Hearings