

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

October 6, 1999

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

**CERTIFIED MAIL,**  
**RETURN RECEIPT**  
Z 283 051 811

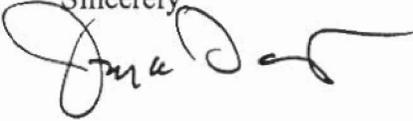
RE: Docket No. 458-99-0732; Texas Alcoholic Beverage Commission vs. Tiburon Corporation d/b/a  
The Bistro, TABC Case No. 581912

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 Dewey Brackin, attorney for Texas Alcoholic Beverage Commission, and to Tiburon Corporation, d/b/a The Bistro, Respondent. For reasons discussed in the proposal, I recommend that Respondent's licenses be suspended for a period of 5 days, or that Respondent be allowed to pay a penalty in lieu of suspension in the amount of \$500.00

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.

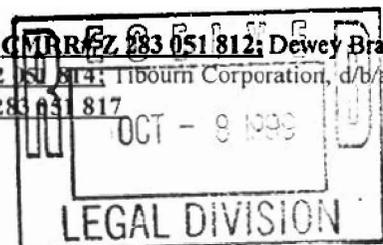
Sincerely,

  
for John W. Swenson, Jr.  
Administrative Law Judge

JS:ds

Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - ~~CMRR# Z 283 051 812~~; Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission - ~~CMRR# Z 282 051 814~~; Tiboum Corporation, d/b/a The Bistro, 5405 W.Lovers Lane, Dallas, Texas 75209-4217- ~~CMRR # Z 283 051 817~~



DOCKET NO. 458-99-0732  
( TABC CASE NO. 581912 )

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

VS.

TIBURON CORPORATION  
d/b/a THE BISTRO  
PERMIT NOS. MB-424653,  
LB-424654 AND CB-437654  
DALLAS COUNTY, TEXAS

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (the Commission) requested a thirty (30) day suspension or a \$3,000.00 fine in lieu of suspension of the mixed beverage permit, mixed beverage late hours permit and caterer's permit (the Permits), issued by the Commission, to the Tiburon Corporation, d/b/a The Bristo (Respondent). The Commission alleged that Respondent committed two violations of the Texas Alcoholic Beverage Code on October 7, 1998, justifying the suspension of Respondent's permits pursuant to §11.11 of the TEX. ALCO. BEV. CODE ANN. (the Code) and 16 TEX. ADMIN. CODE §33.24 (the Rule). Respondent stipulated to the violations, but argued that the violations were caused by misinformation received from the Commission's agents when Respondent obtained the caterer's permit. The Administrative Law Judge finds Respondent's evidence and argument that he did not knowingly violate the Code is persuasive and recommends that Respondent's permits be suspended for five (5) days or that Respondent pay a civil penalty of \$500.00 in lieu of the suspension.

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

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 was held on May 20, 1999, and the record was closed at the conclusion of the hearing. Mr. Dewey Brackin, TABC Commission Attorney, represented the Commission. The Respondent was represented pro se by Mr. Zenon Obrysk, President, Tiburon Corporation.

On October 7, 1998, Texas Alcoholic Beverage Commission Special Agent Laramie Mergerson while inspecting Respondent's premises known as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas, discovered invoices showing that on October 7, 1998, the Respondent (1) did store alcoholic beverages for consumption off the licensed premises and (2) did

sell alcoholic beverages off premises. Both were violations of §28.01 of the Code because the Respondent did not have a caterer's certificate for that specific off premises, catered event .

On January 27, 1999, the Commission notified Respondent of its intent to cancel or suspend the Respondent's permits for the aforementioned violations of the Code and/or Rules of the Commission. The Respondent requested a hearing on the proposed suspension or cancellation of permits as permitted by §11.62 of the Code.

## II. ISSUES

At issue are the following: (a) Did Respondent commit a violation of the Code and/or Rules that would justify suspension of the Permits; (b) Is Defendant's mistake of the law a legal defense; and (c) What, if any, is the proper penalty?

## III. THE LAW

The Commission's authority for the cancellation or suspension of the Permits is set out in §11.61(b)(2) of the Code and in the Commission's Rules at 16 TEX. ADMIN. CODE §31.1.(a)(4), which read, in pertinent parts, as follows:

- **Sec. 11.61.(b)** The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:...
  - (2) the permittee violated a provision of this code or a rule of the commission....

**Sec. 31.1.(a)** The administrator, or his designee, is hereby given jurisdiction in the following matters:...

- (4) cancellation and suspension of permits and licenses, and all matters in connection with hearings thereon....

The laws allegedly violated are §28.01 of the Code and §33.12 of the Rules which read, in pertinent part, as follows:

**Sec. 28.01.(a)** The holder of a mixed beverage permit may sell, offer for sale and possess mixed beverages, including distilled spirits, for consumption on the licensed premises....

**Sec. 33.12.(b)** Except as provided for in subsection (e) of this section, the holder of a caterer's permit, or his designated representative, shall complete a form, provided by the commission, prior to the use of the permit. The forms shall include the following information:

- (1) the caterer's permit number;
- (2) the trade name of the mixed beverage permit associated with the caterer's permit;
- (3) the location of the function(s) to be catered;
- (4) the date(s) and time(s) of the function(s) to be catered; and

(5) a brief description of the function to be catered.

The form shall be signed by a representative of the commission and copy(s) shall be left with the commission at either a district office, an outpost office, or with a local agent or employee authorized to issue such forms. The original of the form shall be placed in a conspicuous place at the location of the catered function during the time that the function is being catered.

The law permitting relaxed sanctions is §11.64 of the Code which reads, in pertinent part, as follows:

**Sec. 11.64.(b)** In the case of a violation of this code by a permittee or a retail dealer's off-premise licensee, the commission or administrator may relax any provision of the code relating to the suspension or cancellation of the permit or license and assess a sanction the commission or administrator finds just under the circumstances ... if the commission or administrator finds that any of the circumstances described in Subsection C of this section exists.

**Sec. 11.64.(c)** The following circumstances justify the application of Subsection (b) of this section ...

(4). That the permittee or licensee did not knowingly violate this code....

#### IV. SUMMARY OF THE EVIDENCE

• • The Commission introduced into evidence a Commission Record listing the licenses and permit held by Respondent. Texas Alcoholic Beverage Commission Special Agent Laramie Mergerson and Respondent's representative Mr Zenon Obrysk testified at the hearing. Agent Mergerson testified that on October 7, 1998, while inspecting Respondent's premises known as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas, he discovered invoices showing that on October 7, 1998, the Respondent (1) did store alcoholic beverages for consumption off the licensed premises and 2) did sell alcoholic beverages off premises. Both were violations of §28.01 of the Code because the Respondent did not have a caterer's certificate, which is required for each off premises, catered event. Mr. Obrysk stipulated in open hearing that the two violations occurred. During further testimony, Mr. Obrysk stated that on the date he obtained the licenses and permit for The Bristo, the two Commission's agents on duty told him that he (Mr. Obrysk) possessed all of the required licenses and permits for his business. Mr. Obrysk testified and argued that, had he been aware of the requirement, he would have paid the relatively inexpensive (eight dollar) fee for the additional caterer's certificate. Mr. Obrysk also argued that a \$3,000 fine was excessive for his small business.

#### V. FINDINGS OF FACT

1. Respondent received proper and timely notice of the hearing from the Commission in a notice of hearing dated April 20, 1999, and proper and timely notice from the Administrative Law Judge in the order setting the hearing and establishing prehearing requirements dated

April 28, 1999.

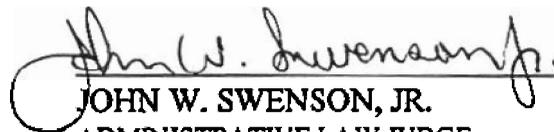
2. The hearing was convened on May 20, 1999. All parties appeared and participated in the hearing.
3. On October 7, 1998, the Respondent was the holder of Mixed Beverage Retailer's Permit No. MB-424653, Retail Dealer's On Premise Late Hours License No. LB-424654 and Caterer's Permit CB-437654 for the premises known as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas.
4. On October 7, 1998, the Respondent did not hold a caterer's certificate.
5. On October 7, 1998, the Respondent was doing business as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas.
6. On October 7, 1998, the Respondent, its agent, employee or servant, while doing business as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas, stored alcoholic beverages for consumption off the licensed premises without a caterer's certificate.
7. On October 7, 1998, the Respondent, its agent, employee or servant, while doing business as The Bristo, located at 5405 W. Lovers Lane, Dallas, Dallas County, Texas, did sell alcoholic beverages for consumption off the licensed premises without a caterer's certificate.
8. The Respondent made a good faith effort to obtain all required caterer's permits and certificates and did not knowingly violate the Code.
9. The Code does not provide a good faith exception or a mistake of law defense.
10. Code §11.64(b) provides for a relaxed sanction if it is found that a permittee did not knowingly violate the Code .

## V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §11.61(b)(2).
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003 and TEX. ALCO. BEV. CODE ANN. Sec. 5.43.

3. Notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Pursuant to §11.61(b)(2) of the Code and in the Commission's Rules at 16 TEX. ADMIN. CODE §31.1.(a)(4), the Commission may suspend for not more than 60 days or cancel a permit if it is found after notice and hearing that the permittee violated a provision of this code or a rule of the Commission.
5. Pursuant to §11.64(b) of the Code, the Commission may relax any sanction of the Code and assess a sanction as the Commission finds just under the circumstances set forth in §11.64(c), which states that the Commission may relax any sanction of the Code and assess a sanction as the Commission finds just under the circumstances if the licensee did not knowingly violate the Code.
6. Based upon the Findings of Fact Nos. Four, Five, Six, Seven, Eight and Nine; Conclusions of Law Nos. Four, Five and Six; §§11.61(b)(2) and 11.64 of the Code; and in the Commission's Rules at 16 TEX. ADMIN. CODE §31.1.(a)(4) Respondent's Permits should be suspended for five (5) days or Respondent should pay a civil penalty of \$500.00 in lieu of the suspension because Respondent did not knowingly committed two violations of the Code on October 7, 1998.

SIGNED this 30th day of September, 1999.



JOHN W. SWENSON, JR.  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS