

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

December 28, 1999

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

VIA CERTIFIED MAIL Z 186 432 009
RETURNED RECEIPT REQUESTED

RE: **Docket No. 458-99-0733; Texas Alcoholic Beverage Commission vs. The Banana Tree Restaurant and Club d/b/a The Banana Tree Restaurant and Club (Permit No. N-198974 and PE-198975) (TABC Case No. 575397)**

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 H. L. McGee, Jr., attorney for The Banana Tree Restaurant and Club d/b/a The Banana Tree Restaurant and Club. For reasons discussed in the proposal, based on findings 3 and 4, Respondent did possess eighteen (18) empty bottles of distilled spirits that had not had the local distributor identification stamp mutilated in violation of TEX. ALCO. BEV. CODE ANN. §28.09 and of TAC §41.72; and based on Conclusion No. 2 and Findings of Fact No. 9, suspension of Respondent's license for a period of 60 days or a payment of a civil penalty in lieu of suspension in the amount of \$7,500.00 is warranted..

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,

Richard Farrow
Richard Farrow
Administrative Law Judge

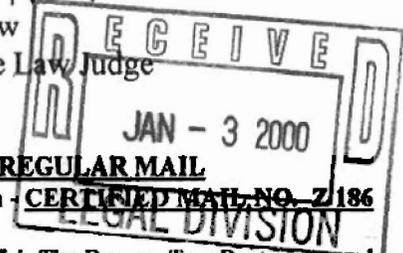
JAN 3 2000

STATE OFFICE OF
ADMINISTRATIVE
HEARINGS

RF:tmn

Enclosure: 1

cc: **Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - REGULAR MAIL**
Dewey Brackin, Attorney For Petitioner, Texas Alcoholic Beverage Commission - CERTIFIED MAIL NO. Z186 432 010, RETURN RECEIPT REQUESTED
H. L. McGee, Jr., Attorney at Law, The Banana Tree Restaurant and Club d/b/a The Banana Tree Restaurant and Club, 1917 S. Beckham, Tyler, Texas 75701 - CERTIFIED MAIL NO. Z 186 432 011, RETURN RECEIPT REQUESTED



Commerce Square

3323 S. SW Loop 323 ♦ Tyler, Texas 75701
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SOAH DOCKET NO. 458-99-0733

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
V.	§	
	§	
THE BANANA TREE RESTAURANT AND CLUB	§	OF
PERMIT NOS. N-198974 AND PE-198975	§	
GREGG COUNTY, TEXAS	§	
(TABC DOCKET NO. 575397)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Commission) brought this action against the Respondent permittee for refusing to allow inspection by an authorized representative of the Commission and for possession on the premises of empty bottles of distilled spirits which had not had the identification stamps invalidated. The facts were disputed. This proposal finds that inspection was not refused but that the Respondent did possess empty bottles of distilled spirits which had not had the identification stamps invalidated. This proposal recommends a 60 day suspension or a civil penalty of \$7,500.00 in lieu of suspension.

I. Procedural History, Jurisdiction and Notice

There were no objections or issues raised as to notice and jurisdiction; therefore those matters are referred to in the findings of fact and conclusions of law without further discussion here.

A hearing was held on June 24, 1999, at the State Office of Administrative Hearings in Tyler, Texas, before Richard Farrow, an Administrative Law Judge with the State Office of Administrative Hearings. Staff was represented by Dewey Brackin, attorney for the Texas Alcoholic Beverage Commission. Respondent was present and was represented by H. L. McGee, attorney. The testimony and other evidence was received and the record was closed on that same date.

II. Discussion of Evidence

On August 25, 1997, TABC enforcement Agent Tullos went to the Respondent's premises with an auditor from the Comptroller's office at the request of the auditor. While the auditor went about his audit, Agent Tullos conducted an inspection of the premises.

Tullos testified that he found several bottles on the premises that appeared to be fuller than they would be from the manufacturer or bottler indicating, in his opinion, that they had been refilled. Tullos also testified that in the office of the premises he found two Crown Royal bottles (1.0 liter) that were empty but that had in tact identification stamps along with another 1.7 liter bottle that was nearly empty and also had not had the tax stamp scratched or mutilated.

There was on the premises, but not attached to the premises, a barbeque shack that agent Tullos also inspected but found no bottles of alcoholic beverages or any other violation. Also on the property were several old vehicles including what was variously referred to as an old bus, van, refrigerator truck, truck bed, milk bus, warehouse, shed, and storage shed. This was apparently an old trailer that had been a refrigerated unit of a truck that was no longer part of a truck but the van, or trailer unit had been removed and was no longer mobile or refrigerated. The unit was self contained in that the door could be shut and there would be no open sides. Respondent testified that he had used it for a storage warehouse in the past. Herein it shall be referred to as a "van". Tullos testified that he looked inside the van and saw several whiskey bottles and after being told by the licensee that there was no key available to unlock the van to allow inspection, Tullos broke the lock and gained access. Inside, he found twelve 1.75 liter and four 1.0 liter whiskey bottles, all empty with valid, unmutated stamps.

Ernest Shelton, Jr., the auditor who had requested Tullos go with him to the premises, said he observed the bottles with the unmutated tax stamps. He also observed Tullos try to open the bus with Mr. Battee's keys but that none of them worked. Shelton testified that Battee had told Tullos several times that he had no key to the bus.

The Respondent, Jerome Battee, has been the President of the Banana Tree Restaurant and Club for the past eleven years. He testified that on this occasion there was only one empty Crown Royal bottle in his office that did not have a mutilated stamp. According to Battee, it was his custom and his direction to his employees that the empty bottles be brought to him so that he could scratch or mutilate the stamps. It was Battee's opinion that the bottle that was in his office when Tullos arrived must have been put there recently for his attention and he had not been back to his office since the bottle had been put there by an employee.

Respondent testified that he told Agent Tullos that he did not have a key to the barbeque shack because it had been rented to someone else but that he had or could send for someone who had a key. Someone ended up crawling through a window and unlocking the shack from inside in order to allow Agent Tullos access to the building.

Mr. Battee also testified that the van had been there for years, had never been inspected by Mr. Tullos in the past, and that he did not have a key to it as he had rented it to Leroy Cains for use in storing tack for Cains' horses. He said that he sent for the man who had the key when Agent Tullos insisted that he be allowed to inspect the inside of the van. Agent Tullos would not wait and broke into the van.

As to the bottles in the van, Battee said he had not been in the van in a long time but recalled that a former employee, Ann Smith, used to take some of the old bottles when they were to be discarded and kept them to make decorations of them and stored them in the back of the van. That would have been some time prior to August, 1997.

Ms. Virginia Ann Smith testified that she had been an employee at the Banana Tree waiting tables and bartending. She was no longer an employee but had left the Banana Tree in 1997 or 1998. While there she would collect empty bottles from behind the bar and put them in the van for later use in making decorative plant vases for resale. She testified that when she needed in the van she would have to get "Leroy" to let her in because he had the key. She admitted that when she left the Banana Tree she may have left some bottles in the van. Ms. Smith brought a decorative bottle/plant vase to the hearing to demonstrate the craft and it should be said that the vase was quite unique and attractive.

Mildred J. Battee works at the Banana Tree on weekends and was so employed in August 1997. She said that she was instructed to scratch the labels off the empties when they became empty and was not instructed to put any bottles aside and let Jerome Battee scratch the stamps and dispose of them at a later time.

The evidence presented described the premises in some detail. The property includes the Banana Tree Club building, a separate smaller building for a barbeque shack that is not connected to the main building, and behind a partial fence, some cars, various trash and the van or "bus" referred to herein. The property all belongs to Respondent and is contiguous.

The permit history was presented in documents admitted into evidence showing the permits issued and the violation history of the Respondent which included a prior violation for failure to mutilate local distributor identification stamps on empty bottles of distilled spirits.

III. Analysis

The first question that the parties and the evidence raised is whether the "van" is a part of the premises of the Permittee over which he may be liable under the Code. The Code defines premises as "the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person." TEX. ALCO. BEV. CODE §11.49. It would seem from the above definition that the barbeque shack and the van are part of the premises and therefore subject to inspection and compliance of the Code provisions and Rules of the Commission.

The next focus for consideration would be whether the bottles found in the van with un mutilated stamps constitute a violation of section 28.09 of the Code requiring the stamp to be mutilated at the time the bottle is emptied. The defense position that the defendant

did not put those bottles in the van but that an employee did so is no defense. An employee's actions are imputed to the license or permit holder under the Code. Mr. Battee's claimed lack of knowledge that the bottles had been put in the van, if taken as true, would not address the question of the un mutilated stamps. Even had someone put the bottles in the van without Mr. Battee's knowledge or permission, the stamps had not been mutilated as required. The fact that there were empty bottles to take without permission with stamps that had not been mutilated indicates a violation.

It was not disputed that the bottle or bottles found in the office of the premises had not had the stamps mutilated. The instruction Mr. Battee testified he had given his employees to deliver to him all empty bottles and he would mutilate the stamps was clearly contradicted by testimony of his employee. Mildred Battee said she was told to mutilate the stamp at the time the bottle was emptied. No other evidence was presented to substantiate Mr. Battee's testimony. Even taken as true, the violation occurred when the bottles were emptied and the stamp not immediately mutilated as required by §28.09(a) and (b). The bottles found in the office with un mutilated stamps are each a violation of the Code subject to penalty. TEX. ALCO. BEV. CODE ANN. §28.09(d).

As to whether Respondent refused to allow inspection of the premises, the fact that Respondent had rented the buildings on the premises and did not have immediate access to those buildings or vehicles does not necessarily constitute refusal. The fact that he admitted he did not have the keys but had offered to send for them does not lend itself to a finding of refusal. Apparently, Respondent helped facilitate Agent Tullos' entry to the barbeque shack. The witnesses testified that to get into the van they would have to go to Mr. Cains for the key. That Respondent **should** have keys to his rented property does not mean that his failure to have them is refusal to allow inspection.

IV. Findings of Fact

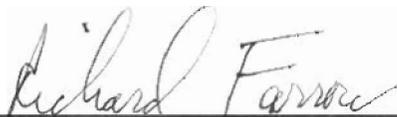
1. Respondent holds Private Club Registration Permit, N-198974 and Beverage Cartage Permit, PE-198975, and held such on August 25, 1997.
2. Notice of hearing was sent to attorney for Respondent and no objection was made as to such notice.
3. On August 25, 1997, two empty bottles of distilled spirits were kept in the Respondent's office with the identification stamps on such bottles intact and not mutilated.
4. On August 25, 1997, sixteen empty bottles of distilled spirits with un mutilated identification stamps were kept in a van or bus located on and a part of the Respondent's premises.
5. The van located behind the main building of the premises was used at times as a storage area for Respondent's business and was at all times under the control of the Respondent.

6. Respondent did not have the keys to the barbeque shack or the van located on the premises at the time inspection was requested.
7. Although Respondent did not have the keys, he did offer to send for the keys or send for the renters who had the keys to the building and van on the premises.
8. Respondent helped TABC agent Tullos to gain access to the barbeque shack in order to inspect the premises, although he did not have the keys.
9. Prior to August 25, 1997, Respondent has had at least one prior adjudicated violation for failure to mutilate local distributor identification stamps on empty bottles of distilled spirits.

V. Conclusions of Law

1. Service of proper and timely notice of the hearing was effected on the Respondent pursuant to TEX. GOVT. CODE ANN. Chapter 2001.
2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX ALCO. BEV. CODE ANN. §§28.09, 32.17, and 61.74.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN. Chapter 2003.
4. Based on findings 4-8, Respondent did not refuse inspection of the premises by an authorized representative of the Texas Alcoholic Beverage Commission.
5. Based on findings 3 and 4, Respondent did possess eighteen (18) empty bottles of distilled spirits that had not had the local distributor identification stamp mutilated in violation of TEX. ALCO. BEV. CODE ANN. §28.09 and of TAC §41.72
6. Based on Conclusion 5 and Finding 9, suspension of Respondent's license for a period of 60 days or a payment of a civil penalty in lieu of suspension in the amount of \$7,500.00 is warranted.

Signed this 28th day of December, 1999.



Richard Farrow
Administrative Law Judge