

DOCKET NO. 587940

IN RE RICHMOND DAIQURI FACTORY II, LLC	§	BEFORE THE
D/B/A DAIQURI FACTORY DRAWFISH CAFE	§	
PERMIT NOS. MB453033, LB453034,	§	
& FB453035	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0872)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl A. Corbitt. The hearing convened and adjourned on June 29, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 16, 2000. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date 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. MB453033, LB453034, and FB453035, are herein **SUSPENDED for fifteen (15) days**.

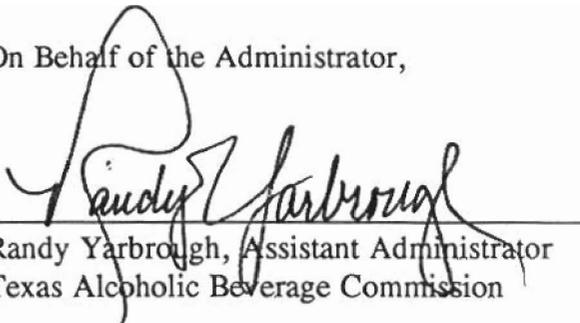
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$2,250.00** on or before the 14th day of **March, 2001**, all rights and privileges under the above described permits will be **SUSPENDED for a period of fifteen (15) days, beginning at 12:01 A.M. on the 21st day of March, 2001**.

This Order will become final and enforceable on January 1, 2001, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 12th day of December, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl A. Corbitt
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4774

Kevin Pehlman
Richmond Daiquiri Factory II, LLC
d/b/a Daiquiri Factory Crawfish Cafe
RESPONDENT
11191 Westheimer PMB 135
Houston, Texas 77042
CERTIFIED MAIL/RRR NO. Z 280 626 774

Holly Wise, Docket Clerk
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Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

DOCKET NO. 458-00-0872

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	OF
RICHMOND DAIQUIRI FACTORY II, LLC D/B/A DAIQUIRI FACTORY CRAWFISH CAFE, PERMIT NOS. MB-453033, LB-453034, & FB-453035	§	
	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the permits held by Richmond Daiquiri Factory II, LLC d/b/a Daiquiri Factory Crawfish Café (the Respondent) based on an allegation the Respondent knowingly possessed or permitted the possession of alcoholic beverages not covered by invoice on the licensed premises. The Staff of TABC (the Staff) sought to have the Respondent's permits suspended for 15 days or, in lieu thereof, to have the Respondent assessed a penalty of \$2,250.00. The Respondent contended it had not previously violated the law or rules of TABC and should be given only a warning. This proposal agrees with the recommendation of the Staff.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

On April 14, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at 11191 Westheimer PMB 135, Houston, Texas 77042. The Respondent received the notice. The hearing convened on June 29, 2000, before Administrative Law Judge (ALJ) Ed Shipper at the offices of the State Office of Administrative hearings (SOAH) at 2020 North Loop West, Suite 111, Houston, Texas. No party challenged jurisdiction or the timeliness and adequacy of notice in this case. Staff Attorney Christopher Burnett represented the Staff. The Respondent was represented by Kevin W. Pehlman. The hearing was closed at the completion of the hearing.

On October 3, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the record in the case including the audio tape of the hearing. No testimony was taken at the hearing and no exhibits were offered into evidence. The ALJ has taken official notice of the notice of hearing.

II. REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 11.61(b)(2).

Section 28.06(c) of the Code provides:

(c) No holder of a mixed beverage permit, nor any officer, agent, or employee of a holder, may knowingly possess or permit to be possessed on the licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.

B. Evidence

1. **Stipulation.** The parties stipulated that the Respondent committed the offense alleged. The allegation contained in the Notice of Hearing is:

Respondent, Richmond Daiquiri Factory KK, LLC, et al, on December 28, 1999, knowingly possessed or permitted the possession of alcoholic beverages not covered by invoice. By knowingly possessing or permitting the possession of alcoholic beverages not covered by invoice, Respondent violated Texas Alcoholic Beverage Code §§ 28.06(c) and (d).

2. **Official Notice.** The ALJ has taken official notice of the contents of the Notice of Hearing.

3. **Other Evidence.** There is no other evidence in the record. No exhibits were offered or admitted. The Respondent addressed the Court, but was not under oath. His unsworn statements are argument and not evidence.

C. Arguments

1. **The Staff's Argument.** The Staff argued the penalty requested is based on the violation alleged, and is that set out in TABC's guidelines. The Staff requested the Respondent be assessed a suspension of 15 days, or in lieu of the suspension, a fine of \$2,250.00.

2. **The Respondent's Argument.** The Respondent argued the violation occurred when his manager left a bottle of liquor, which the manager owned, in the office. He also argued the Respondent had only been licensed six months at the time of the violation and had not committed any previous violations. He argued the Respondent should only receive a "warning" as a result of the violation.

III. ANALYSIS AND RECOMMENDATION

A. Analysis

The parties stipulated the violation occurred as alleged. The seriousness of the violation is demonstrated by the criminal penalty attached by the legislature. Section 28.06(d) provides the violation is a misdemeanor for which a fine of \$500 to \$1000 may be assessed and for which, in addition to the fine, confinement in the county jail for 30 days to two years may also be assessed. SOAH has no criminal jurisdiction. However, the fact that a violation constitutes a crime lends credence to the argument that it is a serious violation.

The Respondent argued the proposed penalty should be relaxed in his case because he was recently licensed and had an unblemished record. He did not argue that the guidelines used by TABC in assessing penalties were unreasonable, but that they should be relaxed for the Respondent.

The Respondent's argument is not weighty. One would expect a licensee to have an unblemished record after having the license for six months. One would hope the license would remain unblemished much longer than that.

In this case the Respondent's manager was careless and that carelessness placed the Respondent in jeopardy. The manager is an agent or employee of the Respondent. The Code requires that the Respondent accept responsibility for actions of its agents and employees.

The ALJ is of the opinion the violation was a serious one and the proposed penalty was not shown to be unreasonable under the circumstances.

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Code or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 11.61(b)(2). The preponderance of the evidence indicates the Respondent violated Section 28.06(c) of the Code.

The Staff recommended the Respondent be assessed a fifteen day suspension of its permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

B. Recommendation

The undersigned ALJ agrees with the Staff and recommends the Respondent be assessed a fifteen day suspension of its permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

IV. PROPOSED FINDINGS OF FACT

1. Richmond Daiquiri Factory II, LLC dba Daiquiri Factory Crawfish Cafe (the Respondent) holds permits numbered MB-453033, LB-453034, and FB-453035 issued by the Texas Alcoholic Beverage Commission (TABC).
2. On December 28, 1999, the Respondent, its agent, or employee knowingly permitted the possession of alcoholic beverages not covered by invoice on its premises.
3. On April 14, 2000, notice of the hearing to consider sanctions against the Respondent for the violation stated in Finding of Fact No. 2 was sent by certified mail, return receipt requested, to the Respondent at its address of record, 11191 Westheimer PMB 135, Houston, Texas.
4. The Respondent or its agent received the notice of hearing.
5. The hearing to consider the allegations convened on June 29, 2000, before Administrative Law Judge Ed Shipper with the State Office of Administrative Hearings (SOAH) in SOAH offices at 2020 North Loop West, Suite 111, Houston, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by Kevin W. Pehlman.
6. The Respondent stipulated that the violation occurred as alleged.

V. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.61.
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. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Findings of Fact Nos. 2-6, the Respondent, its agent, or employee knowingly permitted the possession of alcoholic beverages not covered by invoice on its premises in violation of TEX. ALCO BEV. CODE ANN. §28.06(c).

5. Based on the foregoing findings of fact and conclusions of law, TABC is warranted in suspending the Respondent's licenses and permits for a period of three days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$2,250.00. TEX. ALCO. BEV. CODE ANN. §§6.01(b), and 11.61(b)(2).

SIGNED this 16th day of November, 2000.

for 
EARL A. CORBITT
Administrative Law Judge
State Office of Administrative Hearings