

DOCKET NO. 588501

IN RE PATRICK LYNN THOMAS	§	BEFORE THE
D/B/A Q CLUB	§	
PERMIT NOS. MB421537, LB421538,	§	
PE421539	§	TEXAS ALCOHOLIC
	§	
BELL COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1493)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of September, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. On July 28, 2000, a telephonic pre-hearing conference was conducted. Both parties appeared and participated by telephone. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 1, 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.

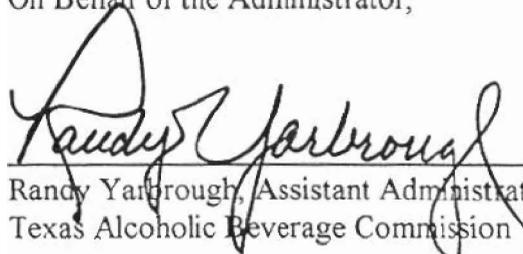
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB421537, LB421538 and PE421539 are herein **SUSPENDED for a period of seven (7) days, beginning at 12:01 A.M. on the 3rd day of January, 2001**, unless the Respondent pays a civil penalty in the amount of \$1,050.00 on or before the 27th day of **December, 2000**.

This Order will become final and enforceable on October 18, 2000, 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 27th day of September, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Suzan Moon Shinder
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (254) 750-9380

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Patrick Lynn Thomas
d/b/a Q Club
RESPONDENT
127 W. Veterans Memorial Blvd.
Harker Heights, Texas 76548
CERTIFIED MAIL/RRR NO. 473 042 975

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Waco District Office
Licensing Division

DOCKET NO. 458-00-1493

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
PATRICK LYNN THOMAS D/B/A Q CLUB PERMIT NOS. MB421537, LB421538, PE421539 BELL COUNTY, TEXAS (TABC CASE NO. 588501)	§	ADMINISTRATIVE HEARINGS
	§	
	§	

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking a ten-day suspension of the permits, or \$150.00 per day civil penalty in lieu of suspension, of Patrick Lynn Thomas d/b/a Q Club (Respondent), based on the Commission's allegation that on January 23, 2000, the permittee, Patrick Lynn Thomas d/b/a Q Club, consumed or permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, violating Texas Alcoholic Beverage Code (Code) §§11.61(b)(2), 61.71(a)(17), and 105.06. The Commission's request for suspension is also based on the Commission's allegation that Respondent sold or offered to sell mixed beverages during prohibited hours, in violation of Code §105.03. Respondent contended that there was no sale or consumption of alcoholic beverages during prohibited hours on that date. This Proposal For Decision recommends a suspension of seven days, or \$150.00 per day civil penalty in lieu of suspension, based on the conclusion that Respondent sold mixed, alcoholic beverages during prohibited hours, in violation of Code §105.03(c).

I. Jurisdiction, Notice, and Procedural History

On July 28, 2000, a telephonic pre-hearing conference was conducted out of the offices of the State Office of Administrative Hearings (SOAH) in Waco, McLennan County, Texas. Both parties appeared and participated by telephone. Petitioner appeared by and through its staff attorney, Christopher Burnett. Respondent appeared pro se. Both parties reported that they were ready for the scheduled hearing on the merits, and the pre-hearing conference was concluded.

The hearing on the merits convened on August 11, 2000, before Administrative Law Judge Suzan Shinder, in the SOAH offices in Waco, McLennan County, Texas. Petitioner appeared by and through its staff attorney, Christopher Burnett. Respondent appeared pro se. The hearing was concluded and the record was closed the same day.

The Commission and SOAH have jurisdiction of this matter as reflected in the Conclusions of Law. The notice of intent to institute the enforcement action and of the hearing met the notice requirements imposed by statute and rule as set forth in the Findings of Fact and Conclusions of Law.

II. The Evidence

It was not disputed that Respondent is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit, issued by the Commission for the premises known as Q Club, located at 127 West Veteran's Memorial Boulevard, Harker Heights, Bell County, Texas 76548, and has been the holder of these permits at all relevant times.

Respondent's Exhibit No. 1

Respondent's Exhibit No. 1 is a six-page exhibit, consisting of several documents, entitled: Facsimile Cover Sheet; Texas Alcoholic Beverage Commission Agreement and Waiver of Hearing; Texas Alcoholic Beverage Commission Offense Report; Texas Alcoholic Beverage Commission Narrative; and, Texas Alcoholic Beverage Commission Administrative Notice.

The Texas Alcoholic Beverage Commission Agreement and Waiver of Hearing states the violation was "sale of alcoholic beverage on licensed premises during prohibited hours," occurring on January 23, 2000. However, it is signed only by a Commission representative.

The Texas Alcoholic Beverage Commission Offense Report addresses Administrative Notice/Criminal Citation # 158196, dated January 23, 2000, the charge of "sale of a/b during prohibited hours," and the identity of Respondent, by name and address. It further identifies involved agents for the Commission, and a person identified as a "witness."

The Texas Alcoholic Beverage Commission Administrative Notice is identified as Notice No. 158196, issued January 23, 2000, identifying the Respondent by name and address. It states the violation was "Sale A/B During Prohibited Hours," and states the date and time of the violation as January 23, 2000, at 2:11 a.m.

According to the Texas Alcoholic Beverage Commission Narrative, the Q Club has held Mixed Beverage Permit number MB 421537 since October 28, 1999. The narrative also states that the bartender, Mr. Edgar Thomas, Jr., is T.A.B.C. certified, according to a computer check of his training. The narrative goes on to describe the location and layout of the Q Club, and to describe the events of January 23, 2000 as regards Administrative Notice #/ Criminal Citation # 158196, in summary, as follows:

Agent Rufus Hooper went to the Q Club on January 23, 2000 at approximately 1:30 a.m., accompanied by Officer Rogers, working in an undercover capacity. At approximately 1:45 the "last call" for alcohol was made and repeated over the sound system. At approximately 2:07 a.m. the bartender behind the admission booth, Mr. Edgar Thomas, Jr., was still serving alcohol, taking orders for drinks from a line in front of the bar. Agent Hooper stood in this line and ordered a "Hennessey and Coke," paying for the drink at approximately 2:11 a.m. He observed that there was alcohol in this drink by its sight and smell. The agent observed the bartender to continue to sell alcohol for approximately ten more minutes after the agent's purchase. The agent then left the bar and gave this information to the "open" agents outside, who went into the club and identified Mr. Edgar Thomas, Jr. as the bartender described by Agent Hooper. The Q Club was issued Administrative Notice, number 158196, for the violation of sections 11.61(b)(2) and 105.03(c) of the Texas Alcoholic Beverage Code, by selling alcoholic beverages on the licensed premises during prohibited hours.

This narrative is dated January 27, 2000, and is signed by "R. J. Hooper."

The Testimony of Commission's Witness, Agent Rufus James Hooper:

Agent Hooper is employed by the Texas Alcoholic Beverage Commission and works out of the Austin district office. He has also worked out of the San Marcos district office, and in an undercover position for this case, out of the Temple office. He was working undercover on January 23, 2000, in response to complaints received about multiple clubs, regarding serving minors and consuming after hours. Holders of mixed beverage permits must stop selling alcoholic beverages at 2:00 a.m., and consumption of alcoholic beverages must cease by 2:15 a.m. During this undercover operation, on January 23, 2000, he went to the Q Club, in Harker Heights. Agent Denny Ochoa and an unnamed undercover female were working with him that evening. He went to the Q Club at approximately 1:30 a.m., Sunday morning.

When inside the Q Club, Agent Hooper heard the "last call" for the sale of alcohol, given sometime shortly before 2:00 a.m. However, he observed the bartender selling alcoholic beverages at 2:07 a.m. He then approached the bartender and purchased an alcoholic beverage, a whiskey or liquor, at 2:11 a.m., and paid cash for this drink. The drink he purchased contained alcohol, based on its appearance, its smell, and its taste, and based on his experience with alcoholic beverages in his capacity as a law enforcement officer. After the agent purchased his drink, he observed that the bartender continued to sell alcoholic beverages. He observed the bartender selling these beverages to customers standing in line until approximately 2:20 or 2:25 a.m. The agent observed two or three other customers purchase drinks after he made his purchase. He saw the bartender mix these drinks with alcohol, and he observed these customers consume these mixed drinks after 2:15 a.m. After the bartender stopped making sales, Agent Hooper went outside and contacted the "open" agent on the scene. Agent Hooper described the bartender making the above sales, to the "open" agent, who went into the Q Club and positively identified this bartender, and wrote the ticket for the violation. Agent Hooper did not recall hearing any announcement that drinks would be removed. He did not see anyone cleaning the club, or removing bottles or glasses from the tables or out of the hands of customers. However, he did observe customers in the bar still consuming alcoholic beverages as late as 2:25 a.m.

The Testimony of Respondent's Witness, Edgar Thomas, Jr.:

Edgar Thomas, Jr. is the father of Patrick Lynn Thomas, and was working as a bartender in the Q Club at all relevant times on January 23, 2000. He closed the bar that evening at 2:00 a.m., and was not selling liquor until 2:25 a.m. No one was consuming alcohol at 2:25 a.m. He had an assistant helping him put away the alcohol. The bartender left the bar area at approximately 2:08 to finish his duties in closing the bar. It takes five to ten minutes to put all the alcohol away and secure the bar. He had put the alcohol away and secured everything by the time Agent Garcia and another police officer approached him, at approximately 2:30 a.m. The bar area was closed down and all the alcohol had been put away by that time. When Agent Garcia approached him, Mr. Thomas had the cash register drawer in his hand, and was preparing to lock up the cash, and to go out from behind the bar, to clean.

The Testimony of Respondent:

Patrick Lynn Thomas d/b/a Q Club is the permittee and Respondent. Because of a contact with Agent Garcia, earlier in the week, regarding earlier allegations that they were serving alcohol

after hours, they started their clean-up of the Q Club at 1:30 a.m. Their first "last call" for alcohol is at 1:30 a.m., a second "last call" is at 1:45 a.m., and a third call is at 1:55 a.m. By 2:00 a.m., they announce that their bar is closed and that customers have ten minutes to consume their alcohol. This is their routine, and it is done every night. On January 23, 2000, at 1:55 a.m., Patrick Thomas reminded the bartender to shut down the bar at 2:00 a.m. A few minutes later, Patrick Thomas went to assist the bartender in closing, and Patrick Thomas cleared tables in the bar at 2:15 a.m. The bar was clean, and Patrick Thomas did not see a line waiting to purchase alcohol at that time.

At 2:30 a.m. Agent Garcia and several other law enforcement officers rushed into the club. There were 350 people in the club at that time, and there were no customers with drinks in their hand at 2:30 a.m.

III. Discussion

Pursuant to Section 105.03 of the Texas Alcoholic Beverage Code (Code), the Commission must prove that Respondent sold or offered for sale mixed beverages after 2:00 a.m. On January 23, 2000, Edgar Thomas, Jr. was the bartender on duty in the Q Club. The acts and omissions of the bartender, Edgar Thomas, Jr., are the acts and omissions of the permittee, Patrick Lynn Thomas d/b/a Q Club, as contemplated by Section 1.04(11) of the Code, which includes any agent, servant, or employee of the holder of the permit as the "permittee."

On January 23, 2000, Edgar Thomas Jr. (the bartender) was working as the bartender, and selling mixed, alcoholic beverages to customers in the Q Club. Agent Hooper may not have been present for the first "last call" for the sale of alcohol at 1:30 a.m.; however, the agent did hear at least one "last call" at approximately 1:45 a.m., and heard this repeated over the sound system. At 2:11 a.m., the bartender sold Agent Hooper a mixed, alcoholic beverage. Subsequent to this sale, Agent Hooper observed the bartender mix and sell mixed, alcoholic beverages to several persons in line behind Agent Hooper, continuing to make these sales for approximately ten more minutes, that being until approximately 2:21 a.m. According to the bartender, it takes five to ten minutes to put all the alcohol away and secure the bar. Although the bartender first testified that he left the bar area at approximately 2:08 a.m., he appeared to contradict himself, when he also testified that he was preparing to go out from behind the bar to clean, at 2:30 a.m. According to Patrick Lynn Thomas, the bartender, and Agent Hooper, the "open" agents did not come into the Q Club until approximately 2:30 a.m. According to the bartender, when Agent Garcia approached him at that time, the bartender still had the cash register drawer in his hand, and was preparing to lock up the cash, and to go out from behind the bar to clean.

The bartender had still not locked up the cash or left the bar area as late as 2:30 a.m. It takes five to ten minutes to put all the alcohol away and secure the bar. Had the bartender stopped selling alcohol at 2:00 a.m., based on his own testimony, he would have been finished closing down and securing the bar area as early as 2:05 a.m., and not later than 2:10 a.m. This leaves not less than twenty minutes of the bartender's time unaccounted for, and makes the bartender's testimony less credible. As a result, it becomes more likely that the bartender did not start the task of clearing and securing the bar area until approximately 2:20 a.m. Based on this, and the testimony of Agent Hooper, the most likely activity engaged in by the bartender between 2:00 a.m. and 2:20 a.m. was the sale of mixed, alcoholic beverages. As a result, a preponderance of the evidence demonstrates that, on January 23, 2000, Respondent sold mixed, alcoholic beverages after 2:00 a.m., in violation of Code Section 105.03(c).

Pursuant to Section 105.06 of the Code, the Commission must prove that Respondent consumed, or possessed with intent to consume, an alcoholic beverage in a public place after 2:15 a.m. Respondent violated the spirit of this section, by selling alcoholic beverages to persons at a time when these persons were prohibited from consuming these beverages. However, there are no facts to support that Respondent consumed, or possessed with intent to consume, an alcoholic beverage during prohibited hours, and this section clearly specifies that the prohibition is directed toward the consumer, not the provider. Therefore, the Administrative Law Judge is unable to conclude that Respondent violated this section of the Code.

In that the Commission was not able to prove one of its allegations, the balance of the above factors would support a somewhat lesser suspension than the ten-day suspension requested by the Commission. Therefore, the undersigned Administrative Law Judge recommends a suspension of seven days, or a \$150.00 per day civil penalty in lieu of suspension.

IV. Findings of Fact

1. On June 2, 2000, the Texas Alcoholic Beverage Commission (Commission) notified Patrick Lynn Thomas d/b/a Q Club (Respondent) of the hearing on the merits, scheduled for August 11, 2000, in the Notice of Hearing served on Respondent by Certified Mail, No. 473040260. This is evidenced by the notice's Certificate of Service, and by Commission's Exhibit No. 1; which is the Notice of Hearing, enclosed in an envelope, addressed to Patrick Lynn Thomas d/b/a Q Club, at 127 West Veteran's Memorial Boulevard, Harker Heights, Texas 76548. This envelope is post marked June 2, 2000, and stamped "1st Notice 6-5-00, 2nd Notice 6-9-00, Return 6-20-00, Unclaimed," and has a certified mail "green card," No. Z 473040260 attached. The Commission's Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and, it advised Respondent of the Commission's allegations that Respondent had permitted others to consume an alcoholic beverage on the licensed premises during prohibited hours, and had sold or offered to sell mixed beverages during prohibited hours, in violation of Code Sections 11.61(b)(2), 61.71(a)(17), 105.06, and 105.03, respectively.
2. On July 28, 2000, a telephonic pre-hearing conference was conducted out of the SOAH offices in Waco, McLennan County, Texas. Both parties appeared and participated by telephone. Petitioner appeared by and through its staff attorney, Christopher Burnett. Respondent appeared pro se. Both parties reported that they were ready for the scheduled hearing on the merits, and this hearing was concluded.
3. At the August 11, 2000, hearing on the merits, the Commission appeared by its attorney Christopher Burnett, and the Respondent appeared pro se. Both parties stipulated that there were no contested issues of notice or jurisdiction in this proceeding.
4. The hearing was convened on August 11, 2000, at the SOAH Hearings Facility, at 801 Austin Avenue, Suite 750, Waco, Texas. Evidence and argument were heard, and the record was closed the same day.
5. Respondent is the holder of a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Beverage Cartage Permit, issued by the Commission for the premises known as the Q Club, located at 127 West Veteran's Memorial Boulevard, Harker Heights, Bell County, Texas 76548, and has been the holder of these permits at all relevant times.

6. Edgar Thomas, Jr. was the bartender for Respondent, on duty in the Q Club, on January 23, 2000.
7. On January 23, 2000, in the Q Club, Edgar Thomas, Jr. sold whiskey or liquor, an alcoholic beverage, to Agent Rufus James Hooper at 2:11 a.m.
8. On January 23, 2000, Agent Hooper observed Edgar Thomas, Jr. mix drinks with alcohol and sell these alcoholic beverages to customers in line behind Agent Hooper for approximately ten more minutes after the agent purchased his drink, making the bartender's last sale of these alcoholic beverages at not earlier than 2:20 a.m.
9. On January 23, 2000, after 2:20 a.m., Agent Hooper observed the customers, described in Finding of Fact No. 8, in the Q Club, consuming the alcoholic beverages that the agent had just observed them purchase from the bartender, Edgar Thomas, Jr. Agent Hooper observed customers in the Q Club consuming alcoholic beverages as late as 2:25 a.m.

V. 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)(Code).
2. The State Office of Administrative Hearings has jurisdiction over the 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(6)(Vernon 2000).
3. As referenced in Findings of Fact Nos. 1-4, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2000).
4. Based on Findings of Fact No. 6 the acts and omissions of Edgar Thomas, Jr., the bartender for the Q Club, are the acts and omissions of the permittee, as contemplated by Section 1.04(11) of the Code (Vernon 1995) which would include any agent, servant, or employee of the holder of the permit as the "permittee."
5. Based on Findings of Fact Nos. 6-8, Respondent sold mixed alcoholic beverages after 2:00 a.m., on January 23, 2000, in violation of Code Section 105.03(c)(Vernon 1995)¹.

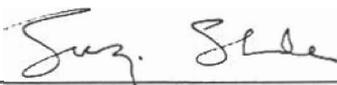
¹Staff plead that Respondent violated Code Section 61.71(a)(17), for which the Administrative Law Judge can find no applicability in this case. Section 61.71(a)(17) provides that a retail dealer's license may be suspended for not more than sixty days if it is found that the licensee, "conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people." The Commission did not plead this language, or establish any connection between the sale or consumption of alcohol during prohibited hours and this section. Additionally, the Commission did not establish a basis for which this section, applicable to licenses, should also apply to Respondent's permits. As a result, this Administrative Law Judge draws no conclusion that Respondent violated Code Section 61.71(a)(17).

6. Pursuant to Code Section 11.61(b)(2)(Vernon 1995), the Commission may suspend for not more than sixty days or cancel a permit if it is found, that the permittee violated a provision of the Code or a rule of the Commission.

7. Pursuant to Code Section 11.64(Vernon 1995 & Supp. 2000), when the Commission is authorized to suspend a permit or license, the amount of the civil penalty in lieu of suspension, may not be less than \$150.00 per day for each day the permit or license was to have been suspended.

8. Based on Findings of Fact Nos. 6-8, and Conclusions of Law Nos. 5 and 6, a seven-day suspension of Respondent's permits is warranted. Based on Conclusion of Law No. 7, in the alternative, Respondent should pay a civil fine of \$150.00 per day for seven days, for a total of \$1050.00.

Signed this 1st day of September, 2000.



Suzan Moon Shinder
Administrative Law Judge
State Office Of Administrative Hearings