

DOCKET NO. 593533

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|-------------------------------|---|---------------------|
| IN RE THE RENEWAL APPLICATION | § | BEFORE THE |
| OF DOYLE LEE FULLER ✓ | § | |
| D/B/A CLUB FRENNADNA'S | § | |
| PERMIT NO. BG-281960 | § | TEXAS ALCOHOLIC |
| | § | |
| TARRANT COUNTY, TEXAS | § | |
| (SOAH DOCKET NO. 458-04-8308) | § | BEVERAGE COMMISSION |

ORDER

CAME ON FOR CONSIDERATION this 3rd day of December, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened on October 29, 2004, and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 15, 2004. 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.

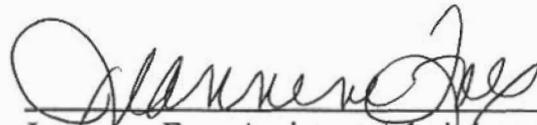
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Renewal Application of Doyle Lee Fuller d/b/a Club Frennadna's, for Wine and Beer Retailer's Permit No. BG-281960 be **DENIED**.

This Order will become final and enforceable on DECEMBER 24, 2004, 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.

SIGNED on this the 3rd day of December, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TG/yt

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE: (817) 377-3706

Doyle Lee Fuller
d/b/a Club Frennadna's
RESPONDENT
1905 E. Vickery St. 'A'
Fort Worth, Texas 76104
CERTIFIED MAIL NO. 7000 1530 0003 1902 7240
RETURN RECEIPT REQUESTED

Timothy Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Fort Worth District Office
Licensing Division

H.215 PRE-HEARING ADMINISTRATIVE CASE INQUIRY
/REH : N PERMITTEE : K. SMARTT INVESTMENTS INC.

HC.PGM.H,215

SET NO : 612358 CLP/HCN/CERT : MB492140
CASE NO : - -
DATE SENT : 11-01-2004

HEARING DATE : HEARING TIME :
SECUTOR : BRACKIN, DEWEY A. HEARING EXAMINER :

RINGS RECD DATE : 10-25-2004 CASE SUBMITTED : 10-19-2004 ORIGIN : E

GE NO : 066 CASE ADOPTED : N

IT DISTRICT : 05 AUDIT DISTRICT NAME : SAN ANTONIO
ORCEMENT DISTRICT : 17 ENF DISTRICT NAME : MCALLEN

NING DATE : WAIVER ORDER DATE :

MISSAL DATE : CLASS/TYPE : MB

T SELECTION (001/PRI,200/INQ,400/EXT,VIO,PVR,PST,APL,CSH,CLP)

DOCKET NO. 458-04-8308

| | | |
|--------------------------------------|---|--------------------------------|
| TEXAS ALCOHOLIC BEVERAGE | § | BEFORE THE STATE OFFICE |
| COMMISSION, PETITIONER, AND | § | |
| FORT WORTH POLICE DEPARTMENT, | § | |
| PROTESTANTS | § | |
| VS. | § | OF |
| | § | |
| DOYLE LEE FULLER D/B/A | § | |
| CLUB FRENNADNA'S | § | |
| TARRANT COUNTY, TEXAS | § | |
| (TABC CASE NO. 593533) | § | ADMINISTRATIVE HEARINGS |

PROPOSAL FOR DECISION

The Fort Worth Police Department (Protestants) joined by the Staff of the Texas Alcoholic Beverage Commission (Staff) protested the renewal of Doyle Lee Fuller d/b/a Club Frennadna's (Respondent) wine and beer permit and retail dealer's on-premise late hours license. The Administrative Law Judge (ALJ) recommends the permit and license not be renewed.

I. PROCEDURAL HISTORY

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law. Respondent filed a renewal application for his permit and license. The Staff notified Respondent that the Fort Worth Police Department had protested the application, on the basis that "the place or manner in which the applicant may conduct [its] business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency."¹ The Staff joined in the protest. The matter was referred to the State Office of Administrative Hearings (SOAH). On October 29, 2004, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth,

¹ TEX. ALCO. BEV. CODE ANN. § 11.46(a)(8)(Vernon 2004)(the Code).

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Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent was represented by his manager, Gina Jackson. The record closed on October 29, 2004.

II. DISCUSSION

A. Applicable Law

The TABC may refuse to renew a permit if it has “reasonable grounds to believe” and finds that “the place or manner in which the applicant may conduct his business warrants the refusal of a permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.”²

Generally, to deny a permit to a qualified applicant, some “unusual condition or situation must be shown so as to justify a finding that the place or manner in which the applicant may conduct his business warrants a refusal of a permit.”³ The evidence concerning the unusual condition or situation must be more than mere conclusions.⁴ The Code does not define how the place or manner in which a business might be operated to justify a denial of a permit, giving the TABC discretion in making this decision; there is no set formula.⁵

The holder of a retail dealer's on-premise late hours license may not sell beer for consumption on

² §§ 11.46(a)(8), 11.61(b)(7), 61.42(a)(3), 61.71(a)(17), and 61.50 of the Code.

³ *Texas Alcoholic Beverage Comm'n v. Mikulenka*, 510 S.W.2d 616, 619 (Tex.Civ.App.--San Antonio 1974, no writ); *Elliott v. Dawson*, 473 S.W.2d 668, 670 (Tex.Civ.App.--Houston [1st Dist.] 1971, no writ).

⁴ *In re Simonton Gin, Inc.*, 616 S.W.2d 274, 276 (Tex.Civ.App.-Houston [1st Dist.] 1981, no writ).

⁵ *Brantley v. Texas Alcoholic Beverage Comm'n*, 1 S.W.3d 343, 347 (Tex.App.--Texarkana 1999, no writ); *see also, Helms v. Texas Alcoholic Beverage Comm'n*, 700 S.W.2d 607, 611 (Tex.App.--Corpus Christi 1985, no writ); *Ex parte Velasco*, 225 S.W.2d 921, 923 (Tex.Civ.App.-Eastland 1949, no writ).

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the premises after 2 a.m.⁶

Gambling,⁷ gambling promotion,⁸ and keeping a gambling place⁹ are offenses defined by the Texas Penal Code.

The Code provides

When a person applies for a permit, the commission or administrator may give due consideration to the recommendations of the . . . chief of police . . . of the city or town in which the premises sought to be licensed are located If a protest against the issuance of a permit is made to the commission by any of these officers and it is found on a hearing or finding of facts that the issuance of the permit would be in conflict with the provisions of this code, the commission or administrator shall enter an order setting forth the reasons for refusal.¹⁰

The "due consideration" to be given to these recommendations is addressed to the Commission's discretion. "Due consideration" means to accord such weight or significance to the recommendations as the Commission deems merited under the circumstances.¹¹ It is an honest judgment weighing conflicting

⁶ §§ 70.01, 105.04, and 105.5(c) of the Code.

⁷ TEX. PEN. CODE ANN. § 47.02(a)(3)(Vernon 2004)(P.C.): A person commits an offense if he plays and bets for money or other thing of value at any game played with cards, dice, balls, or any other gambling device. A "bet" is "an agreement to win or lose something of value solely or partially by chance." § 47.01(1) of the P.C.

⁸ § 47.03(a)(1) of the P.C.: A person commits an offense if he intentionally or knowingly operates a gambling place. A "gambling place" is a building or room "one of the uses of which is the making or settling of bets." § 47.01(3) of the P.C.

⁹ § 47.04(a) of the P.C.: A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.

¹⁰ § 11.41(a) of the Code.

¹¹ See *Black's Law Dictionary* (Rev. 4th ed. 1968).

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claims¹² and all the facts and circumstances present in the case.¹³

B. Evidence

TABC issued wine-and-beer retailer's permit BG281960 and retail dealer's on-premise late hours license BL281961 to Respondent. Respondent's licensed premises are located at 1905 East Vickery Street "A," Fort Worth, Tarrant County, Texas. The premises are located in a former school building. A number of different rooms have been designated as clubs, *i.e.*, Honey Blues Bar,¹⁴ the Pink Lady Bar, and the 19th Hole Bar, aside from Club Frennadna's. There is one main entry to the building, which leads to an open area which give access to the various clubs. This entrance is monitored by a television camera. One hallway in the building leads to a back room. The access to this back room is also monitored by a television camera. Both camera views are displayed in a disc jockey's booth which has direct access through a wall opening to the back room. The back room was referred to by the witnesses as the "gambling room."

In November 2000, Respondent filed a renewal application for the permit and license. On November 30, 2000, the Fort Worth Police Department filed a written protest of the application with the TABC.

1. The Formal Protest

Protestants named four bases for their request:

¹² *Bailey and Williams v. Westfall*, 727 S.W.2d 86, 90 (Tex.App.-Dallas 1987); *Grand Int'l Bro. of Locomotive Engrs. v. Wilson*, 341 S.W.2d 206, 210-211 (Tex.Civ.App.-Fort Worth 1960, writ ref'd n.r.e.).

¹³ *Barrientos v. Texas Employers' Ins. Ass'n*, 507 S.W.2d 900, 904 (Tex.Civ.App.-Amarillo 1974, writ ref'd n.r.e.); *Brown v. Low. Col. Riv. Auth.*, 485 S.W.2d 369, 371 (Tex.Civ.App.-Austin 1972, no writ); *see also Jasso v. Robertson*, 771 S.W.2d 231, 234 (Tex.App.-Hous. [1st Dist.] 1989).

¹⁴ The room is also referred to as the Honey Bees Bar.

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- On September 24, 2000, at 2:43 a.m., a bar patron was discovered consuming an alcoholic beverage during prohibited hours. The patron was also discovered to be in possession of over five grams of cocaine.¹⁵
- On December 30, 1999, Respondent's employee was arrested for promotion of gambling, and 10 patrons were cited for gambling.¹⁶
- On June 19, 1999, alcoholic beverages in the Honey Blues Bar, the Pink Lady Bar, and the 19th Hole Bar were confiscated by TABC agents because the bars were not permitted by the TABC.¹⁷
- Since 1992, Respondent's permit and license have been suspended on six occasions, for 12 violations, for 34 days. The suspensions were for cash law violations, public lewdness, "place or manner" violations, and consumption of alcoholic beverages during prohibited hours. Protestants also noted that alleged violations are pending for possession of unauthorized alcoholic beverages, gambling, sale or delivery of narcotics, and consumption of alcoholic beverages during prohibited hours.¹⁸

Protestants requested the permit and license renewal be denied for violation of sections 25.04(a), 61.42(a)(3), and 61.43(3)(3), (9), and (10) of the Code.¹⁹

2. Protestants' Evidence

Officer D. A. Sullivan of the Fort Worth Police Department was present in the "gambling room" in the premises on December 30, 1999. Officer Sullivan was under cover and participated in a dice game with nine other individuals. An employee of the Respondent, Willy Price, ran the game and took a percentage of every wager made on every roll of the dice.

¹⁵ TABC Exhibit No.4, pp. 1, 14-18

¹⁶ TABC Exhibit No.4, p. 1.

¹⁷ TABC Exhibit No.4, pp. 1, 29-30.

¹⁸ TABC Exhibit No.4, pp. 1-2.

¹⁹ TABC Exhibit No.4, pp. 2-3.

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On September 24, 2004, TABC Agent Tricia O' Casey Rutledge was part of a law enforcement team which entered the premises. She made her way to the gambling room, and observed a dice game in progress among seven patrons.

TABC Agent Tana Travis was also present at the premises on September 24, 2004, at approximately 2:45 a.m. She entered the Honey Blues Bar, and observed approximately 100 to 120 patrons. The patrons were drinking from red or clear plastic cups. Agent Travis confirmed by sight and smell that the cups (or a representative sample) contained beer or mixed drinks. In particular, Agent Travis observed Donald Gilmore, Respondent's employee and a bartender, watching Calvin McMillan consume beer and Timothy Blackburn consume a mixed drink concocted of a soft drink and a distilled spirit. Agent Travis spoke to a Mr. Powell who she identified as Respondent's manager. When Agent Travis pointed out his patrons were consuming alcohol during prohibited hours, Mr. Powell asserted that as long as the premises did not sell the alcohol to the patron allowing them to drink was not illegal. Mr. Powell also asserted he could not control the crowd. Mr. McMillan, however, stated that he had been served his beer by Respondent's employees after hours.

C. Discussion

Respondent offered no evidence or argument. The uncontradicted evidence shows that the Fort Worth police department has protested Respondent's renewal application and stated specific reasons for their action. Not only does gambling take place on the premises on a regular basis, the ALJ infers from the siting of the cameras and their monitors that Respondent promotes gambling by attempting to provide security from the police for the gaming. Respondent promotes and allows after-hours drinking. Respondent's past violation history exhibits an indiscriminate disregard for the law.

Therefore, the ALJ recommends Respondent's renewal application be denied.

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III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued wine-and-beer retailer's permit BG281960 and retail dealer's on-premise late hours license BL281961 to Doyle Lee Fuller d/b/a Club Frennadna's (Respondent).
2. Respondent's licensed premises are located at 1905 East Vickery Street "A," Fort Worth, Tarrant County, Texas.
3. The premises are located in a former school building. A number of different rooms have been designated as clubs, *i. e.*, Honey Blues Bar, the Pink Lady Bar, and the 19th Hole Bar, aside from Club Frennadna's.
4. There is one main entrance to the building, which leads to an open area which give access to the various clubs. This entrance is monitored by a television camera.
5. One hallway in the building leads to a back room. The access to this back room is also monitored by a television camera.
6. Both camera views are displayed in a disc jockey's booth which has direct access through a wall opening to the back room.
7. The back room is referred to as the "gambling room."
8. Officer D. A. Sullivan of the Fort Worth Police Department was present in the "gambling room" on the premises on December 30, 1999.
9. Officer Sullivan was undercover and participated in a dice game with nine other individuals.
10. An employee of the Respondent, Willy Price, ran the game and took a percentage of every wager made on every roll of the dice.
11. On September 24, 2004, TABC Agent Tricia O'Casey Rutledge was a part of a law enforcement team which entered the premises.
12. Agent Rutledge made her way to the gambling room, and observed a dice game in progress between seven patrons.
13. TABC Agent Tana Travis was present at the premises on September 24, 2004, at approximately 2:45 a.m.

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14. Agent Travis entered the Honey Blues Bar, and observed approximately 100 to 120 patrons.
15. The patrons were drinking from red or clear plastic cups.
16. Agent Travis confirmed by sight and smell of a representative number that the cups contained beer or mixed drinks.
17. Agent Travis observed Donald Gilmore, Respondent's employee and a bartender, watching Calvin McMillan consume beer and Timothy Blackburn consume a mixed drink concocted of a soft drink and a distilled spirit.
18. Mr. McMillan had been served his beer by Respondent's employees after hours.
19. Mr. Powell, Respondent's manager, was aware the patrons were consuming alcohol during prohibited hours.
20. In November 2000, Respondent filed renewal applications for the permit and license.
21. On November 30, 2000, the Fort Worth Police Department (Protestants) filed a written protest of the renewal with the TABC.
22. Protestants named four bases for their request:
 - (a) On September 24, 2000, at 2:43 a.m. a bar patron was discovered consuming an alcoholic beverage during prohibited hours. The patron was discovered to be in possession of over five grams of cocaine.
 - (b) On December 30, 1999, Respondent's employee was arrested for promotion of gambling, and 10 patrons were cited for gambling.
 - (c) On June 19, 1999, alcoholic beverages in the Honey Blues Bar, the Pink Lady Bar, and the 19th Hole Bar were confiscated by TABC agents because the bars were not permitted by the TABC.
 - (d) Since 1992, Respondent's permit and license have been suspended on six occasions, for 12 violations, for 34 days. The suspensions were for cash law violations, public lewdness, "place or manner" violations, and consumption of alcoholic beverages during prohibited hours. Protestants also aver that alleged violations are pending for possession of unauthorized alcoholic beverages, gambling, sale or delivery of narcotics, and consumption of alcoholic beverages during prohibited hours.

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23. Protestants recommendations are entitled to due consideration.
24. On March 7, 2003, the TABC sent Respondent a letter notifying Respondent that the Staff had received a protest of Respondent's renewal application.
25. The matter was referred to the State Office of Administrative Hearings (SOAH) for a hearing
26. On August 17, 2004, the Staff of the TABC (Staff) served its Notice of Hearing (NOH) on Respondent.
27. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
28. The NOH scheduled a hearing for September 10, 2004, at 11:00 a.m.
29. On September 10, 2004, Respondent appeared and requested a continuance.
30. Respondent's motion for a continuance was granted, and ALJ Tanya Cooper orally rescheduled the hearing for October 29, 2004, at 10:00 a.m.
31. ALJ Cooper's oral setting was confirmed by Prehearing Order No. 3, which was served on Respondent on or about September 22, 2004.
32. On October 29, 2004, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent was represented by his manager, Gina Jackson. The record was closed on October 29, 2004.

IV. CONCLUSIONS OF LAW

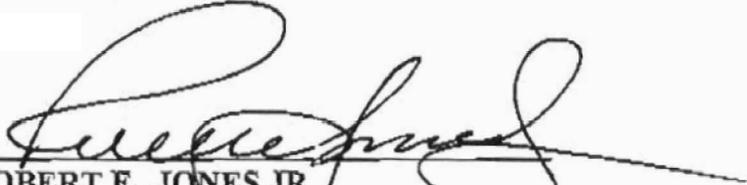
1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2004).

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3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2004).
4. Based on the foregoing findings and conclusions, Respondent violated the Code by selling beer for consumption on the premises after 2 a.m. §§ 70.01, 105.04, and 105.5(c) of the Code.
5. Based on the foregoing findings and conclusions, Respondent promoted gambling and kept a gambling place on the premises. TEX. PEN. CODE ANN. §§ 47.01(3), 47.03(a)(1), and 47.04(a) (Vernon 2004).
6. Based on the foregoing findings and conclusions, the place and manner in which Respondent conducts his business warrants the refusal of the renewal application based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. § 11.46(a)(8) of the Code.
7. Based on the foregoing findings and conclusions, Respondent's renewal application should be denied. § 11.46(a)(8) of the Code.

SIGNED November 15, 2004.

ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS