

DOCKET NO. 602495

IN RE EASTSIDE HOTEL INC.	§	BEFORE THE
D/B/A LINDA'S LOUNGE	§	
PERMIT NOS. MB-463859 & PE-463860	§	
	§	TEXAS ALCOHOLIC
	§	
TAYLOR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-6446)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3rd day of September, 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 July 22, 2004, and adjourned same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 2, 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 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 Mixed Beverage Permit No. MB-463859 and Beverage Cartage Permit No. PE-463860 are hereby **SUSPENDED**.

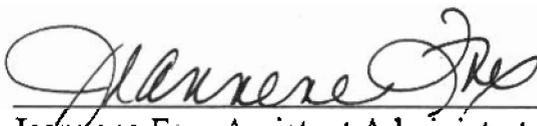
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,800.00 on or before the 20th day of October, 2004, all rights and privileges under the above described permits will be **SUSPENDED** for a period of twelve (12) days, beginning at 12:01 A.M. on the 27th day of October, 2004.

This Order will become final and enforceable on September 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 3rd day of September, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

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

Larry Whitten, President
Eastside Hotel, Inc.
Linda's Lounge
RESPONDENT
840 Hwy. 80 E.
Abilene, Texas 79602
CERTIFIED MAIL NO. 7000 1530 0003 1902 6540
RETURN RECEIPT REQUESTED

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Abilene District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 602495

REGISTER NUMBER:

NAME: EASTSIDE HOTEL INC.

TRADENAME: LINDA'S LOUNGE

ADDRESS: 840 Hwy. 80 East

DATE DUE: October 20, 2004

PERMITS OR LICENSES: MB-463859 & PE-463860

AMOUNT OF PENALTY: \$1,800.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 20th DAY OF October, 2004, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address

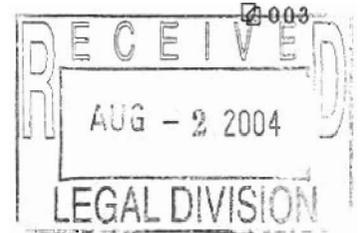
P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.



DOCKET NO. 458-04-6446

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
EASTSIDE HOTEL, INC. D/B/A BROKEN ARROW LOUNGE TAYLOR COUNTY, TEXAS (TABC CASE NO. 602495)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought suspension of the permits held by Eastside Hotel, Inc. d/b/a Broken Arrow Lounge (Respondent). The Staff alleged Respondent violated the Texas Alcoholic Beverage Code (the Code) when it: (1) permitted consumption of an alcoholic beverage on its premises during prohibited hours, and (2) permitted possession of an alcoholic beverage not covered by an invoice on its premises. This proposal finds that Respondent violated the Code as the Staff alleged. The Administrative Law Judge (ALJ) recommends that Respondent's permits be suspended or that Respondent be allowed to pay a civil penalty in the alternative.

I. PROCEDURAL HISTORY

On July 22, 2004, a public hearing was convened before ALJ Robert F. Jones Jr. at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Dewey A. Brackin, an attorney with the TABC Legal Division. Respondent appeared through its president, Larry Whitten. The record was closed on July 22, 2004.

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law.

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II. THE EVIDENCE

The parties stipulated to the facts of the case. The TABC issued Respondent mixed beverage permit MB463859 and beverage cartage permit PE463860. Respondent's premises are located at 840 Highway 80 East, Abilene, Taylor County, Texas. On October 26, 2002, at approximately 12:48 a.m., TABC Agents Cathleen Cavazos and Harold Salmon made a routine inspection of Respondent's premises. A party was taking place in Respondent's banquet hall, which is a part the permitted premises. The door was locked. When the agents gained entry, they confirmed that a number of people were consuming alcoholic beverages. The agents were informed by Respondent's employee, Jennifer Walker, that the party was private and was a BYOB (bring your own bottle) party. The guests at the party confirmed they had brought their own alcoholic beverages onto the premises. The agents treated the situation as an administrative matter and did not file criminal charges.

Larry Whitten, Respondent's president, testified on behalf of Respondent. Mr. Whitten testified he has been operating hotels and bars in the Abilene area for 18 years. On three prior occasions, he has been approached to host after-hours parties for various people and causes. He has done so based upon a telephone conversation he had with a TABC compliance officer in 1988. Mr. Whitten testified he was informed that an after-hours private party on a permitted premises was legal if (1) the alcoholic beverages served were privately purchased, (2) the alcoholic beverages belonging to Respondent were locked away, and (3) the server was not paid by Respondent, but instead remunerated by tips from the guests. Mr. Whitten testified that the October 26, 2002, party was conducted under those conditions. He admitted that the party was in fact in violation of the Code, but asserted that the violations were not intentional but were the result of mistaken reliance on misunderstood advice.

Respondent has two prior violations. On August 15, 2000, the TABC imposed a seven-day suspension of Respondent's permits for selling an alcoholic beverage to a minor. Respondent had the option of paying a \$ 1,050 penalty. The violation took place on August 3, 2000. On February 4, 2004, the TABC imposed a 10-day suspension of Respondent's permits for having an intoxicated employee on the

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premises. Respondent had the option of paying a \$ 1,500 penalty. The violation took place on January 4, 2004.

III. DISCUSSION AND ANALYSIS

A. The Governing Law

Respondent violated Section 105.06 of the Code when it permitted consumption of an alcoholic beverage on its premises during prohibited hours.¹ Respondent violated Section 28.06 of the Code when it permitted possession of an alcoholic beverage not covered by an invoice on its premises.² The TABC's standard penalty chart allows a settlement³ of a five-day suspension for a first time violation of Section 105.06(b) and a 10-day suspension for a first time violation of Section 28.06.⁴ The standard penalty chart is not binding in a SOAH hearing, and any penalty recommended must be based on the record.⁵ Since Respondent has violated the Code, the Respondent's permits are subject to suspension for as long as 60 days.⁶

Respondent is entitled to an opportunity to pay a civil penalty rather have its permits suspended.

¹ TEX. ALC. BEV. CODE ANN. § 105.06(b) (Vernon 2004) (the Code) states: "a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a. m. and 12 noon or on any other day between 12:15 a. m. and 7 a. m." October 26, 2002 was a Saturday.

² § 28.06(b) of the Code states: "No holder of a mixed beverage permit, nor any officer, agent, or employee of a holder, may possess or permit to be possessed on the premises for which the permit is issued any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased."

³ 16 TEX. ADMIN. CODE (TAC) § 37.60(a).

⁴ *Id.*, § 37.60 (standard penalty chart).

⁵ *Id.*, § 37.60 (g).

⁶ § 11.61(b)(2) of the Code. The Staff did not request cancellation of Respondent's permits, and this proposal will consider a suspension only.

The civil penalty may not be less than \$150 for each day of suspension.⁷ The amount "must be appropriate for the nature and seriousness of the violation,"⁸ and should reflect consideration of the type of license or permit held, the type of violation, any aggravating or ameliorating circumstances, and the permittee's previous violations.⁹ The amount may not be based on the financial condition of Respondent.¹⁰

B. Arguments and Analysis

1. TABC

The Staff recommended a civil penalty of \$750 for the violation of Section 105.06 (5 days X \$150/day), and a civil penalty of \$1,500 for the violation of Section 28.06 (10 days X \$150/day), or a total civil penalty of \$2,250. The Staff based its recommendation on the standard penalty chart but acknowledged that the ALJ might reach a different conclusion based upon the statutory factors set out in Section 11.641.

2. Respondent

Respondent argued that these violations were not intentional and that its permits should be suspended for a total of five days, or a civil penalty of \$750 imposed.

⁷ § 11.64(a) of the Code.

⁸ § 11.641(a) of the Code.

⁹ § 11.641(a) of the Code. "Aggravating or ameliorating circumstances" include: (1) that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence; (2) that the permittee or licensee was entrapped; (3) that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee; (4) that the permittee or licensee did not knowingly violate this code; (5) that the permittee or licensee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations; or (6) that the violation was a technical one. §§ 11.641(a)(3), 11.64(c) of the Code. Each will be considered below.

¹⁰ § 11.641(b)(4) of the Code.

3. Analysis

The "nature and seriousness"¹¹ of the violations come into focus when considering the following:

- **Type of Permit Held.** Respondent holds a mixed beverage permit and beverage cartage permit.¹²
- **Type of Violation.** Section 105.06 of the Code is a "Health, Safety and Welfare Violation." Section 28.06 is a "Major Regulatory Violation."¹³
- **Any Aggravating or Ameliorating Circumstances Concerning the Violations:¹⁴ Due Diligence.** Respondent's violations could reasonably have been prevented by the exercise of due diligence. A telephone call to the local TABC agents would have disclosed the problem with an after-hours private party. Instead, Mr. Whitten relied on information from 1988, hardly an exercise of due diligence.¹⁵
- **Aggravating or Ameliorating Circumstances: Entrapment.** Neither Respondent nor Mr. Whitten was coaxed or persuaded to host the private party by law enforcement agents.¹⁶
- **Aggravating or Ameliorating Circumstances: Code Violated Without the Knowledge of the Respondent.** Respondent in the person of Mr. Whitten knew about and gave permission for the after hours party.¹⁷
- **Aggravating or Ameliorating Circumstances: Knowing Violation of the Code.** A person acts knowingly with respect to the nature of his conduct when he is aware of the nature of his conduct.¹⁸ Mr. Whitten thought allowing the after-hours party was lawful so long as he followed

¹¹ § 11.641(a) of the Code.

¹² § 11.641(a)(1) of the Code.

¹³ § 11.641(a)(2) of the Code; 16 TAC § 37.60 (standard penalty chart).

¹⁴ § 11.641(a)(3) of the Code.

¹⁵ § 11.64(c)(1) of the Code.

¹⁶ § 11.64(c)(2) of the Code; TEX. PENAL CODE ANN. § 8.06 (Vernon 2004).

¹⁷ § 11.64(c)(3) of the Code.

¹⁸ TEX. PENAL CODE ANN. § 6.03(h) (Vernon 2004).

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the advice he had received in 1988. Accordingly, Respondent did not knowingly violate the Code.¹⁹

- **Aggravating or Ameliorating Circumstances: Good Faith & Remedial Actions.** Respondent did not contest the essential facts of the case, and admitted that the private after-hours party violated the Code. Mr. Whitten's pledge not to allow private after-hours parties is sufficient to assure any future violations.²⁰

Aggravating or Ameliorating Circumstances: Technical Violation. The violation of Section 105.06 is not technical. The alcoholic beverages were being consumed at 12:48 a.m., well after the statutory cut off time of 12:15 a.m. The violation was clear cut and substantial. The violation of Section 28.06 is technical in the sense that although the alcoholic beverages were consumed on the premises Respondent did not purchase the beverages itself, and their service would probably not be subject to gross receipts taxes.²¹

- **Previous Violations.** Selling an alcoholic beverage to a minor is a "Health, Safety and Welfare Violation." The standard penalty chart recommends a seven to 20 day suspension for first violation. Respondent had the option for a seven-day suspension or to pay a \$ 1,050 penalty. Having an intoxicated employee on the premises is a "Health, Safety and Welfare Violation" The standard penalty chart recommends a 10-to 15 day suspension for first violation. Respondent had the option for a ten-day suspension or to pay a \$ 1,500 penalty.²²

Respondent sells mixed drinks and it is very important that its liquor business be run in accordance with the Code and TABC regulations. The statues violated are not trivial. Mr. Whitten did not exercise due diligence. Respondent was not entrapped and the unlawful conduct had the full knowledge and consent of Respondent's officer. The "after-hours" violation was substantial. Respondent does not have a good history of past violations, which were serious and substantial. On the other hand, Mr. Whitten did not knowingly violate the law, has demonstrated good faith, and has taken the necessary remedial actions. The ALJ recommends that the Commission impose a suspension for the violation of Section 105.06 of five days

¹⁹ § 11.64(c)(4) of the Code.

²⁰ § 11.64(c)(5) of the Code.

²¹ §§ 11.64(c)(6), 105.06(b) (12:15 a.m. cut-off); 16 TAC §41.50(d)(2)(F) (complimentary alcoholic beverages may be subject to the gross receipts tax).

²² § 11.641(a)(4) of the Code; 16 TAC § 37.60 (standard penalty chart).

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or an alternative civil penalty of \$750. The ALJ recommends that the Commission impose a suspension for the violation of Section 28.06 of seven days or an alternative civil penalty of \$1,050. Even though the violation of Section 28.06 was technical, Respondent surrendered control over an aspect of its premises. The Respondent's violation history militates against any further leniency.

In summary, the ALJ recommends that the Commission suspend Respondent's permits for 12 days or allow Respondent to pay a civil penalty of \$1,800.

IV. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued Eastside Hotel, Inc. d/b/a Broken Arrow Lounge (Respondent) mixed beverage permit MB463859 and beverage cartage permit PE463860.
2. Respondent's premises are located at 840 Highway 80 East, Abilene, Taylor County, Texas.
3. On October 26, 2002, at approximately 12:48 a. m., TABC Agents Cathleen Cavazos and Harold Salmon made a routine inspection of Respondent's premises.
4. A party was taking place in Respondent's permitted premises. A number of people were consuming alcoholic beverages. The agents were informed by Respondent's employee, Jennifer Walker, that the party was private and was a BYOB (bring your own bottle) party. The guests at the party confirmed they had brought their own alcoholic beverages onto the premises.
5. Larry Whitten is Respondent's president. Mr. Whitten authorized the October 26, 2002, party on the basis of a telephone conversation he had with a TABC compliance officer in 1988.
6. Mr. Whitten believed an after-hours private party on a permitted premises was legal if :
 - (a) the alcoholic beverages served were privately purchased,
 - (b) the alcoholic beverages belonging to the Respondent were locked away, and
 - (c) the server was not paid by Respondent, but instead remunerated by tips from the guests.

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7. Respondent permitted consumption of an alcoholic beverage on its premises during prohibited hours.
8. Respondent permitted possession of an alcoholic beverage not covered by an invoice on its premises.
9. Respondent's violations could reasonably have been prevented by the exercise of due diligence.
10. Neither Respondent nor Mr. Whitten was coaxed or persuaded to host the private party by law enforcement agents.
11. Respondent, in the person of Mr. Whitten, knew about and gave permission for the after hours party.
12. Respondent did not knowingly violate the Code.
13. Respondent did not contest the essential facts of the case, and admitted that the private after-hours party violated the Code.
14. Mr. Whitten's pledge not to allow private after-hours parties is sufficient to assure any future violations.
15. The violation of Section 105.06 is not technical because the alcoholic beverages were being consumed at 12:48 a.m., well after the statutory cut off time of 12:15 a.m. The violation was clear cut and substantial.
16. The violation of Section 28.06 is technical in the sense that the alcoholic beverages consumed on the premises were not purchased by Respondent.
17. On August 15, 2000, the TABC imposed a seven-day suspension of Respondent's permits for selling an alcoholic beverage to a minor. Respondent had the option of paying a \$ 1,050 penalty. The violation took place on August 3, 2000. Selling an alcoholic beverage to a minor is listed in TABC's standard penalty chart as a "Health, Safety and Welfare Violation." The standard penalty chart recommends a seven to 20 day suspension for first violation.
18. On February 4, 2004, the TABC imposed a 10-day suspension of Respondent's permits for having an intoxicated employee on the premises. Respondent had the option of paying a \$ 1,500 penalty. The violation took place on January 4, 2004. Having an intoxicated employee on the premises is listed in TABC's standard penalty chart as a "Health, Safety and Welfare Violation." The standard penalty chart recommends a 10-to 15 day suspension for first violation.

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19. On July 2, 2004, Staff issued a notice of hearing notifying all parties that a hearing would be held on the application and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
20. On July 22, 2004, a public hearing was convened before ALJ Robert F. Jones Jr. at the State Office of Administrative Hearings, 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Dewey A. Brackin, an attorney with the TABC Legal Division. Respondent appeared through its president, Larry Whitten. The record was closed on July 22, 2004.

V. CONCLUSIONS OF LAW

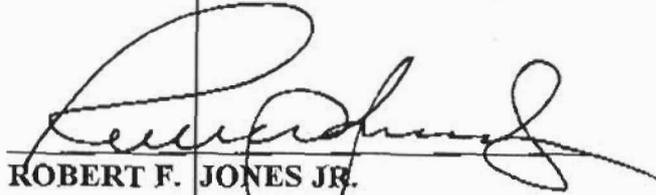
1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2004).
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, Respondent violated the Code when it allowed consumption of an alcoholic beverage on its premises during prohibited hours. § 105.06 of the Code.
5. Based on the foregoing findings, Respondent violated the Code when it permitted possession of an alcoholic beverage not covered by an invoice on its premises. § Section 28.06 of the Code.
6. Based on the foregoing findings, Respondent's permits are subject to suspension. § 11.61(b)(2) of the Code.
7. Based on the foregoing findings, Respondent is entitled to an opportunity to pay a civil penalty rather have its permits suspended. § 11.64(a) of the Code.
8. Based on the foregoing findings, and considering the nature and seriousness of Respondent's violations, the ALJ recommends that the Commission suspend Respondent's permits for 12 days or allow Respondent to pay a civil penalty of \$1,800.

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SIGNED August 2, 2004.



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