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DOCKET NO. 604865

IN RE JAMES BARNES SCHUSLER	§	BEFORE THE
D/B/A J & J'S HIDE AWAY	§	
PERMIT/LICENSE NOS. MB154935,	§	
LB154936	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0214)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of January 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on November 18, 2005, and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 20, 2005. This Proposal For Decision **(attached hereto as Exhibit "A")**, 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 Respondent's permits and licenses be **SUSPENDED for seven (7) days.**

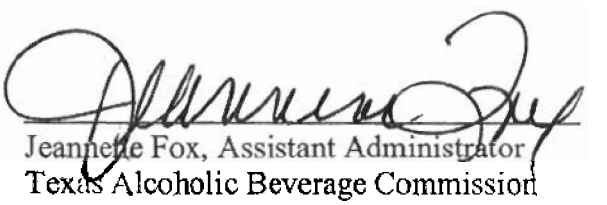
IT IS THEREFORE ORDERED that unless Respondent pays a civil penalty in the amount of **$1,050.00** on or before the **8th** day of **March 2006**, all rights and privileges under the above described permits will be **SUSPENDED for a period of seven (7) days, beginning at 12:01 A.M. on the 15th day of March 2006.**

This Order will become final and enforceable on February 1, 2006, 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 11th day of January 2006.

On Behalf of the Administrator,



Jeannette Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 731-1964

James Barnes Schusler
RESPONDENT
d/b/a J & J's Hide Away
PO Box 470246
Fort Worth, TX 76147-0246
CERTIFIED MAIL/RRR NO. 7001 2510 0000 7274 4585

Edwin Fitzgerald
ATTORNEY FOR RESPONDENT
VIA FAX (817) 737-3105

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604865 **REGISTER NUMBER:**

NAME: JAMES BARNES SCHUSLER **TRADENAME: J & J'S HIDE AWAY**

ADDRESS: 3305 West 7th Street, Fort Worth, Tarrant County, Texas

DATE DUE: March 8, 2006

PERMITS OR LICENSES: MB154935, LB154936

AMOUNT OF PENALTY: $1,050.00

Amount remitted $_____ Date remitted _____

If you wish to a 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 8TH DAY OF MARCH 2006, 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

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.

LEGAL

RECEIVED DEC 20 2005 LEGAL DIVISION

DOCKET NO. 458-06-0214

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
JAMES BARNES SCHUSLER D/B/A J & J'S HIDE AWAY Respondent (TABC CASE NO. 604865)	§	ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action[1] against James Barnes Schusler d/b/a J & J's Hide Away (Respondent), alleging that Respondent operated his business in a place or manner that warranted a suspension or cancellation of his permits based upon the general welfare, health, peace, morals, and safety of the people and the public sense of decency because Respondent permitted a person to consume, or possess with intent to consume, an alcoholic beverage on the licensed premises, a public place, at any time on Sunday between 2:15

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[1] The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found after notice and hearing, that any the permittee/retail dealer violated a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

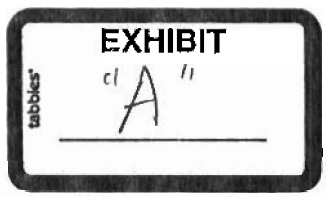
* * * *

All provisions of the Code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit. TEX. ALCO. BEV. CODE ANN. § 29.03.

* * * *

Permittee means a person who holds a permit provided for in the Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE ANN. § 1.04(11)

Person means a natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any them. TEX. ALCO. BEV. CODE ANN. § 1.04(6).



a.m. and 12 noon or any other day between 2:15 a.m. and 7:00 a.m. in violation of the Texas Alcoholic Beverage Code (the Code). TABC Staff sought a twenty-day suspension of Respondent's permits, or a $3000 civil penalty in lieu of suspension,[2] in relation to this allegation.

The ALJ finds the evidence was sufficient to establish that Luanne Sibley consumed, or possessed with intent to consume, an alcoholic beverage during a time when said activity was prohibited. However, the evidence in this matter does not support that Respondent has operated his business in a manner that was contrary to the public's interest. Accordingly, the ALJ recommends no enforcement action be taken against Respondent for the alleged place and manner of operations violation, but does recommend that Respondent's permits be suspended for a period of seven days, or in lieu of any suspension of Respondent's permits, that Respondent pay a civil penalty in the amount of $1,050, as a result of the after-hours consuming violation.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, 28, and 29 and 16 TEX. ADMIN. CODE § 31.1 *et. seq.* (the Rules). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. chs. 2001 and 2003. There were no contested issues of notice or jurisdiction in this proceeding.

On November 18, 2005, a hearing convened before ALJ Tanya Cooper, at the SOAH offices located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. TABC Staff was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent appeared and was represented by Edwin Fitzgerald, attorney at law. The hearing concluded on that day, but the record remained

[2] When the Texas Alcoholic Beverage Commission is authorized to cancel or suspend a permit, a civil penalty may be authorized to be not less than $150 or more than $25,000 for each day the permit was to have been suspended. TEX. ALCO. BEV. CODE ANN. § 11.64(a).

open in order to allow the parties to file case law and other written argument in support of their respective positions. The record closed on December 2, 2005.

II. EVIDENCE

Respondent holds a Mixed Beverage Permit, MB154935, and a Mixed Beverage Late Hours Permit, LB154936, issued by TABC for Respondent's premises located at 3305 W. 7th Street, Fort Worth, Tarrant County, Texas. Respondent's permits were initially issued on August 29, 1983, and have been continuously renewed since that date. TABC Agent Tana Travis and Louann Sibley testified at the hearing.

A. Agent Travis' testimony.

Agent Travis stated that she and three other TABC agents were at Respondent's licensed premises at approximately 2:50 a.m. on April 5, 2003. While outside the licensed premises, Agent Travis said she saw three cars parked on the licensed premises' parking lot and that the lights were on inside the bar. Agent Travis looked through the licensed premises' windows and observed two females. Agent Travis said one woman was doing paper work, while the other woman was seated at the end of the bar. The woman at the end of the bar was drinking from a plastic cup. Agent Travis testified that she continued watching the activities inside the bar for approximately ten minutes.

The doors to the licensed premises were locked, so the agents knocked on a side door requesting entrance to the licensed premises. The woman doing paper work opened the bar's door and the agents came inside. The women were identified as Respondent's employees. Louann Sibley, the women seated at the bar drinking from the cup, said that she was the licensed premises' bartender.

When asked about the contents of the cup, Ms. Sibley told the agents it was cranberry juice. Agent Travis smelled the cup's contents, and in her opinion, the contents smelled of an alcoholic

beverage, vodka. Agent Travis said she told Ms. Sibley that the cup smelled of vodka. Ms. Sibley then told Agent Travis that there could possibly be some residue of vodka in the cup from a drink that a customer had bought for her earlier in the evening. Ms. Sibley further said that once she had finished the drink containing vodka, she refilled the cup with cranberry juice only for the rest of the evening.

Agent Travis testified that the odor of alcoholic beverage seemed stronger than from vodka residue when she blew into the cup, so she decided to use a passive alcohol sensor device ("sniffer") to test the cup's contents. The sensor device used by Agent Travis reacted to the cup's contents indicating the presence of alcoholic beverage in the high range on the sensor's meter. Agent Travis said that TABC Staff generally used several different methods to test of the presence of alcohol in any beverage. These methods included container labeling, the passive alcohol sensor device, or by an agent's sense of sight, smell, or taste, but tasting was employed only if the beverage had not been consumed by anyone else.

During cross-examination, Agent Travis acknowledged that she could not measure alcohol concentration by her individual sense of smell, but felt capable of detecting the presence of alcohol in a beverage from her training and experience. When using the sensor device on Ms. Sibley's cup, Agent Travis said that she had stepped outside one of the premises' doors and held the sensor three to five inches away from the beverage. Agent Travis said there could have been a trash dumpster nearby, but did not believe that any other source of alcoholic beverage had interfered with her testing of the cup's contents because she had tested the sensor in the area where she was using it and received no reading for the presence of alcohol until she held the device near the cup. When asked about a disclaimer from the sensor's manufacturer stating that the sensor was not for "evidential testing purposes," Agent Travis stated that she was not aware of that specific language, but said that in her training for using the device, she was instructed that the sensor was to be considered as an "extension of the officer's nose."

Agent Travis said that pursuant to provisions of the Code and TABC rules, TABC Staff can

inspect a licensed premises at any time. As a result, Agent Travis said that a licensed premises was a public place, even when the business operated from the licensed premises is closed. Ms. Sibley received a citation for the consuming after-hours violation, but Agent Travis stated that she was not aware of what, if any, disposition had occurred concerning that citation. Agent Travis testified that Respondent's licensing history maintained by TABC Staff contained a previous violation of this same Code provision.

B. Louann Sibley's testimony.

Ms. Sibley testified that she was a waitress and bartender at Respondent's licensed premises and was working at the bar on April 5, 2003. Ms. Sibley said she had started her shift at Respondent's business at around 8:30 or 9:00 p.m. on April 4, and that the bar was closed when Agent Travis and other agents arrived at approximately 2:15 a.m. on April 5. According to Ms. Sibley, she and another employee were the only persons inside the licensed premises, and the door was locked when she closed the bar. Ms. Sibley stated that she was drinking cranberry juice from a 16-ounce plastic cup when the agents arrived. She acknowledged that toward the first of her shift a customer had bought her a drink (cranberry juice and vodka). Although she drank slowly during her shift, Ms. Sibley testified that the drink with alcohol in it had been finished long before Agent Travis arrived at the licensed premises, and after finishing the drink, she had only put cranberry juice into the cup.

Ms. Sibley said that when Agent Travis entered the bar, she took the cup from her and sniffed its contents. According to Ms. Sibley, Agent Travis was the only person who thought the cup smelled of alcoholic beverage, but Agent Travis said she wanted to test its contents just the same. Ms. Sibley stated that Agent Travis took the cup outside near the trash dumpster where numerous empty containers of alcoholic beverage were present. When Agent Travis returned, she told Ms. Sibley that the cup's contents tested to the level 0.7 alcohol.

III. ANALYSIS

It is a violation of the Code for a TABC permit holder to conduct business on the licensed premises in a place or manner which warrants the cancellation or suspension of any permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7). In support of TABC Staff's allegation against Respondent in this matter, it further contended that Respondent permitted Ms. Sibley to consume, or possess with intent to consume, alcoholic beverage on the licensed premises at a time of day when that activity was prohibited.[3]

In examining the underlying Code violation which was asserted by TABC Staff, the ALJ finds that the evidence supports TABC Staff's position that alcohol was consumed on the licensed premises at a time of day when that activity was prohibited. Agent Travis observed Ms. Sibley, a waitress and bartender at Respondent's licensed premises, seated at the end of the licensed premises' bar. It was approximately 2:50 a.m. on April 5, 2003, a time of day that is well beyond the permissible hours for consuming alcoholic beverages in a public place.

Agent Travis watched activities inside Respondent's licensed premises for several minutes. There were two women inside the licensed premises; one woman was doing paper work, while Ms. Sibley continued to be seated at the bar. Agent Travis saw Ms. Sibley drinking from a white plastic cup. After Agent Travis and other TABC agents entered the licensed premises, Agent Travis inquired about the cup's contents and sniffed the contents to ascertain if there was alcohol present in the liquid. Agent Travis smelled the odor of alcoholic beverage coming from inside the cup. Ms.

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[3] In an extended hours area, a person commits an offense if he consumes or possess with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a.m. and 12 noon and on any other day between 2:15 a.m. and 7 a.m. TEX. ALCO. BEV. CODE ANN. § 105.06.

Sibley acknowledged that the cup had earlier contained vodka, an alcoholic beverage,[4] mixed with cranberry juice. Agent Travis confirmed the presence of alcohol in the cup by using an alcohol sensing device. Proof of the exact concentration of alcohol in Ms. Silbey's cup is not required. Accordingly, even a trace amount of alcohol is sufficient to satisfy the requirements of a violation pursuant to Section 105.06 of the Code.

Lastly, TABC Staff's contention that Respondent's licensed premises is a public place was correct. "Public place" is not defined in the Code; however, the Texas Penal Code provides that a public place is any place to which the public or a substantial group of the public has access and includes, but is not limited to, streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops. TEX. PENAL CODE § 1.07(a)(40). Respondent's contention that the business was closed at the time TABC agents entered his licensed premises does not change the underlying character of the premises, in that it is an area to which a substantial group of the public has access to, not unlike a shop or office building. Additionally, TABC Staff has authority to enter and inspect a licensed premises for Code violations at any time, which further supports that a licensed premises is a public place.

For the reasons listed above, the ALJ finds that Respondent is responsible for a Code violation, permitting after-hours consumption on the licensed premises. Nevertheless, the ALJ finds that this violation, together with the previous after-hours violation that Respondent accepted a penalty from TABC Staff in 2001, are insufficient to demonstrate that Respondent's business is operated in a manner contrary to the general welfare, health, peace, morals, and safety of the people and the public sense of decency.

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[4] Alcoholic beverage means alcohol, or any beverage containing more the one-half of one percent of alcohol by volume, which is cable of use for beverage purposes, either alone *or when diluted.* TEX. ALCO. BEV. CODE ANN. § 1.04(1) (Emphasis Added.)

While no information was presented concerning the 2001 violation, the evidence in this instance showed that no patrons were consuming after hours at Respondent's licensed premises on April 5, 2003. Respondent's two employees were the only persons present at the licensed premises when they were observed by the TABC agents. Furthermore, only a relatively small amount of alcoholic beverage was being consumed by Ms. Sibley at the time TABC agents observed her conduct, and there was no evidence to suggest that Ms. Sibley was intoxicated from her consumption of alcoholic beverage. In the ALJ's opinion, at most this incident should have warranted a warning from TABC agents were it not for the 2001 violation. Nevertheless, because this is technically Respondent's second violation of Section 105.06 of the Code, the ALJ finds that the minimum permit suspension period applicable to a second violation of this type pursuant to TABC's Standard Penalty Chart[5] is appropriate.

Respondent has held TABC-issued permits since 1983. Only one other Code violation has been established over that time prior to the April 2003 violation established in this case. Having failed to produce evidence demonstrating pattern of conduct by Respondent that is detrimental to the general public's interests, the ALJ finds that no penalty should be assessed in relation the TABC Staff's place and manner allegation.

IV. RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for a period of seven days, or in lieu of any suspension, that Respondent be allowed to pay a civil penalty in the amount of $1,050 based upon Respondent permitting a person to consume, or possess with intent to consume, an alcoholic beverage on the licensed premises, a public place, at a time of day when alcoholic beverage consumption is prohibited. No penalty should be assessed against Respondent for the alleged place and manner of operations violation on the licensed premises because the evidence was

[5] 16 TEX. ADMIN. CODE § 37.06 provides that a permit or license may be suspended for a period of five days upon the first violation of Sections 61.71(a)(18) or 105.06; the suspension period increases to a range of 7 - 10 days upon a second violation; and upon a third violation, the penalty increases ranging from a 25-day permit/license suspension to cancellation of the permit or license.

insufficient to support TABC Staff's burden of proof.

V. FINDINGS OF FACT

1. James Barnes Schusler d/b/a J & J's Hide Away (Respondent) holds a Mixed Beverage Permit, MB154935, and a Mixed Beverage Late Hours Permit, LB154936, issued on August 29, 1983, by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 3305 West 7th Street, Fort Worth, Tarrant County, Texas, and said permits have been continuously renewed since that time.

2. On April 5, 2003, Louann Sibley worked as a waitress and bartender at the licensed premises described in Finding of Fact No. 1.

3. On that day at approximately 2:50 a.m., Ms. Sibley was observed by TABC Agent Tana Travis sitting at the end of the licensed premises' bar and drinking from a plastic cup.

4. Ms. Sibley was alone inside the licensed premises except for another female employee who was working on paper work when Agent Travis and other TABC agents requested entrance inside the bar; the licensed premises' doors were locked at that time.

5. Once inside the licensed premises, Agent Travis took the cup from Ms. Sibley and smelled its contents.

6. When asked about the cup's contents, Ms. Sibley told Agent Travis it had contained vodka and cranberry juice earlier in the evening, but had been refilled with cranberry juice only since the initial drink containing alcohol was consumed.

7. Agent Travis noted an odor of alcoholic beverage in the cup and used a passive alcohol sensor device ("sniffer") to test the cup's contents.

8. The sensor detected the presence of alcoholic beverage inside the cup.

9. Since Respondent's permits were issued in 1983, Respondent's violation history contains one other Code violation, a consuming after-hours violation accepted by Respondent in 2001.

10. Respondent's business has not been operated in a manner detrimental to the general public's interests.

11. A hearing in this matter was conducted on November 18, 2005, at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. Administrative Law Judge Tanya Cooper presided. TABC Staff was represented by TABC

Staff Attorney, Timothy Griffith. Respondent was represented by Edwin Fitzgerald, attorney at law. The record closed in this case on December 2, 2005.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 6, 28, and 29, and §§ 11.61 and 105.06.

2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting 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. chs. 2001 and 2003.

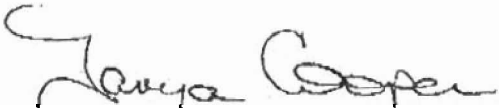
3. Respondent received adequate notice of the proceedings and hearing as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

3. Based upon Proposed Findings of Fact Nos. 1 - 8, Respondent permitted a person to consume, or possess with intent to consume an alcoholic beverage on the licensed premises, a public place, at any time on Sunday between 2:15 a.m. and 12 noon or on any other day between 2:15 a.m. and 7:00 a.m. in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.06.

4. Based upon Proposed Findings of Fact Nos. 1 - 10, TABC Staff's evidence is insufficient to establish that Respondent conducted its business in a place or manner which warrants the cancellation or suspension of its permits based on the general welfare, health, peace, morals, and safety of the people and the public sense of decency in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(7).

5. Based on the foregoing Proposed Findings of Fact Nos. 1 - 9 and Conclusion of Law No. 3, Respondent's Mixed Beverage Permit, MB154935, and Mixed Beverage Late Hours Permit, LB154936, issued by TABC should be suspended for a period of seven days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of $1,050. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.64(a), and 105.06, and 16 TEX. ADMIN CODE § 37.06.

SIGNED DECEMBER 20, 2005



TANYA COOPER, Administrative Law Judge
State Office of Administrative Hearings

STATE OFFICE OF ADMINISTRATIVE HEARINGS

6777 Camp Bowie Blvd.
Ft. Worth, Texas 76116
Phone (817) 731-1733
Fax (817) 377-3706

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: James Barnes Schusler d/b/a J & J's Hide Away

DOCKET NUMBER: 458-06-0214

AGENCY CASE NO: 604865

Timothy Griffith
Staff Attorney
Texas Alcoholic Beverage Commission
Fax: 972/547-5093

AGENCY COUNSEL
BY FAX

Edwin Fitzgerald
Attorney at Law
817/737-3105

ATTORNEY FOR RESPONDENT
BY FAX

As of December 20, 2005

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

December 20, 2005

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

RE: Docket No. 458-06-0214; Texas Alcoholic Beverage Commission vs James Barnes Schusler d/b/a J & J's Hide Away (TABC Case No. 604865)

Dear Mr. Steen:

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 Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and Edwin Fitzgerald, Attorney for the Respondent. The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against James Barnes Schusler d/b/a J & J's Hide Away (Respondent), alleging that Respondent operated his business in a place or manner that warranted a suspension or cancellation of his permits based upon the general welfare, health, peace, morals, and safety of the people and the public sense of decency because Respondent permitted a person to consume, or possess with intent to consume, an alcoholic beverage on the licensed premises, a public place, at any time on Sunday between 2:15 a.m. and 12 noon or any other day between 2:15 a.m. and 7:00 a.m. in violation of the Texas Alcoholic Beverage Code (the Code).

The ALJ finds the evidence was sufficient to establish that Luanne Subley consumed, or possessed with intent to consume, an alcoholic beverage during a time when said activity was prohibited. However, the evidence in this matter does not support that Respondent has operated his business in a manner that was contrary to the public's interest. Accordingly, the ALJ recommends no enforcement action to be taken against Respondent for the alleged place and manner of operations violation, but does recommend that Respondent's permits be suspended for a period of seven days, or in lieu of any suspension of Respondent's permits, that Respondent pay a civil penalty in the amount of $1,050, as a result of the after hours consuming violation.

6777 Camp Bowie Blvd., Suite 400 ◆ Fort Worth, Texas 76116
(817) 731-1733 Fax (817) 377-3706

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, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

Tanya Cooper

Tanya Cooper
Administrative Law Judge

TC/ds
attachments

Edwin Fitzgerald, Attorney for Respondent, VIA FACSIMILE 817/737-3105
Timothy Griffith, TABC Staff Attorney, VIA FACSIMILE 972/547-5093

TG +

DOCKET NO. 502482

RE DALLAS R & S INTERNATIONAL INC.	§	BEFORE THE
D/B/A BUY LOW FINA	§	
PERMIT/LICENSE NOS. Q-541000, BF541001	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-0190)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of January, 2006, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on October 20, 2005 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 19, 2005. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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.

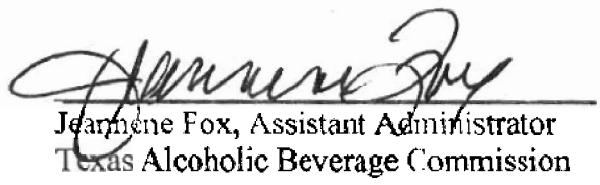
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's permits and licenses be **CANCELLED FOR CAUSE.**

This Order will become final and enforceable on **February 1, 2006** 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 this 11th day of January, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

Dallas R & S International Inc.
d/b/a Buy Low Fina
RESPONDENT
2745 West North West Highway
Dallas, Texas 75220
VIA CM/RRR NO. 7001 2510 0000 7274 4608

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-06-0190

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	**OF**
	§	
DALLAS R & S INTERNATIONAL INC. D/B/A BUY LOW FINA,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this action against Dallas R & S International Inc. d/b/a Buy Low Fina (Respondent), alleging that Respondent made false or misleading statements in connection with its original or renewal application, in violation of the Texas Alcoholic Beverage Code. Respondent failed to appear at the hearing, and the hearing proceeded on a default basis. Petitioner requested that Respondent's permits be canceled for cause. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permit and license.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 6.01, 11.61 and 61.71. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On September 22, 2005, Petitioner issued its notice of hearing, directed to Respondent. The notice of hearing was received by Respondent on or about September 26, 2005. The 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; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as

required by TEX. GOV'T CODE ANN. § 2001.052. The notice of hearing also contained the following language in 12-point or larger boldface type: "If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default."

On October 20, 2005, a hearing convened before SOAH ALJ Brenda Coleman at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent did not appear and was not represented at the hearing. Petitioner presented evidence regarding notice and jurisdiction. The record closed on October 2, 2005.

II. DISCUSSION

Based on the failure of Respondent to appear at the hearing, Petitioner requested that the default provisions of 1 TEX. ADMIN. CODE (TAC) § 155.55 be invoked. The ALJ finds that Petitioner issued notice in compliance with 1 TAC §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN. § 11.63. Pursuant to 1 TAC § 155.55, the allegations presented in the notice of hearing are deemed admitted as true. Accordingly, the ALJ has incorporated these allegations into the Proposed Findings of Fact below. Based on the deemed factual findings in this case, Respondent's permits should be canceled.

III. FINDINGS OF FACT

1. Dallas R & S International Inc. d/b/a Buy Low Fina (Respondent), holds a Wine Only Package Store Permit, Q-541000, and a Beer Retailer's Off-Premise License, BF-541001, issued by the Texas Alcoholic Beverage Commission (Petitioner), for the premises located at 2745 West Northwest Highway, Dallas, Dallas County, Texas.

2. On September 22, 2005, Petitioner issued its notice of hearing by certified mail, return receipt requested, to Respondent at Respondent's last known address, setting the hearing on the merits for October 2, 2005.

3. The notice of hearing was received by Respondent on September 26, 2005. The return receipt was signed by "Jesse M."

4. The 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; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

5. The notice of hearing also contained the following language in 12-point or larger boldface type: "If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default."

6. A hearing convened before Brenda Coleman, Administrative Law Judge with the State Office of Administrative Hearings (SOAH), on October 20, 2005. Petitioner appeared through its Staff Attorney, Timothy Griffith. Respondent did not appear and was not represented at the hearing. The record closed on that same date.

7. On April 16, 2003, Respondent filed its original application with the TABC.

8. On question C7D of the original application, Respondent lists Hooshang Raoof as director, president, secretary, and owner of 600 shares. Respondent lists Afaq Ahmed Siddiqui as stockholder/member and owner of 400 shares.

9. Respondent's Articles of Incorporation, dated March 25, 2003, list Hooshang Raoof and Afaq Ahmed Siddiqui as the directors.

10. Respondent's 2003 income tax return lists Hooshang Raoof as the only shareholder.

11. Respondent's bank authorization resolution, dated April 27, 2003, lists Hooshang Raoof as vice-president and Afaq Ahmed Siddiqui as President.

12. Respondent's bank authorization resolution, dated June 3, 2004, lists Hooshang Raoof as vice-president and Afaq Ahmed Siddiqui as President.

13. On July 26, 2004, Respondent executed a renewal application.

14. On question 5 of the renewal application, Respondent lists Hooshang Raoof as president and secretary.

15. On question 6 of the renewal application, Respondent lists Hooshang Raoof as owner of 600 shares. Respondent lists Afaq Ahmed Siddiqui as stockholder of 400 shares.

16. On question 11 of the renewal application, Respondent states there have been no changes since its original application that have not been reported.

17. On March 8, 2005, Respondent's Business Organization filed with the Secretary of State lists

Hooshang Raoof and Afaq Ahmed Siddiqui as directors.

18. Respondent made false or misleading statements in response to question C7D of its original application, and/or to questions five, six and eleven of the renewal application.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 6.01, 11.61 and 61.71.

2 The SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was effected on Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.

4. A default judgment should be entered against Respondent pursuant to 1 TAC § 155.55.

5. Respondent violated the Texas Alcoholic Beverage Code. TEX. ALCO. BEV. CODE ANN. §§11.61(b)(4) and 61.71(a)(4).

6. Respondent's permits should be canceled. TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(4) and 61.71(a)(4).

SIGNED December 19, 2005.

Brenda Coleman

BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Dallas R & S Internat :nal d/b/a Buy Low Fina

DOCKET NUMBER: 458-06-0190

AGENCY CASE NO: 502482

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Dallas R & S International Inc.
d/b/a Buy Low Fina
2745 West North West Hwy.
Dallas, Texas 75220

RESPONDENT
VIA REGULAR MAIL

as of December 19, 2005

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

December 19, 2005

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

RE: Docket # 458-06-0190
TABC VS. DALLAS R & S INTERNATIONAL, INC.,
D/B/A BUY LOW FINA
TABC CASE NO. 502482

Dear Ms. Fox:

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Brenda Coleman

Brenda Coleman
Administrative Law Judge

BC/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, **Via Fax**,
Dallas R & S International, Inc., D/B/A Buy Low Fina, Respondent, **Via Regular Mail**

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