

DOCKET NO. 607951

IN RE ABC GROUP, INC.	§	BEFORE THE
D/B/A COME N GO	§	
PERMIT NO. BQ439738	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-8612)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of December, 2004, 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 October 22, 2004, and adjourned on October 22, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 10, 2004. 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 be **SUSPENDED**.

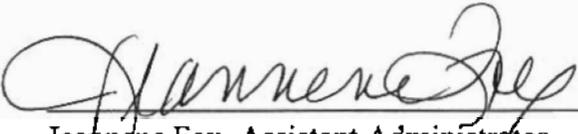
IT IS THEREFORE ORDERED that unless Respondent pays a civil penalty in the amount of \$750.00 on or before the 19th day of January, 2005, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the 26th day of January, 2005.

This Order will become final and enforceable on December 22, 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 1st day of December, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

ABC Group, Inc.
d/b/a Come N Go
RESPONDENT
1401 Cooks Lane
Fort Worth, TX 76120
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1902 1958

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 607951

REGISTER NUMBER:

NAME: ABC GROUP, INC.

TRADENAME: COME N GO

ADDRESS: 1401 Cooks Lane, Fort Worth, Tarrant County, Texas 76120

DATE DUE: January 19, 2005

PERMITS OR LICENSES: BQ439738

AMOUNT OF PENALTY: \$750.00

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 19TH DAY OF JANUARY 2005, 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.

DOCKET NO. 458-04-8612

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner**

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BEFORE THE STATE OFFICE

V.

OF

**ABC GROUP D/B/A
COME N GO, Respondent
TARRANT COUNTY, TEXAS
(TABC CASE NO. 607951)**

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

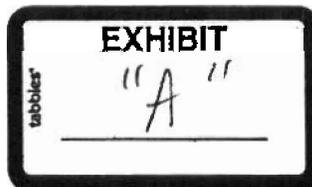
The Texas Alcoholic Beverage Commission (TABC) Staff brought this disciplinary action against ABC Group d/b/a Come N Go (Respondent), alleging a violation of the Texas Alcoholic Beverage Code (the Code) in that Respondent or Respondent's agent, servant, or employee allowed a breach of the peace on the licensed premises.¹ TABC Staff sought suspension of Respondent's permit for a period of ten days, or a civil penalty in lieu of any suspension in the amount of \$1,500.00.

The Administrative Law Judge (ALJ) finds the evidence sufficient to establish that Respondent or Respondent's agent, servant, or employee allowed a breach of the peace on the licensed premises; however, the ALJ recommends suspension of Respondent's permit for five days, or that Respondent be

¹ The commission or administrator may suspend or cancel the license of a retail beer dealer... if it finds a breach of the peace has occurred on the licensed premises or on premises under the licensee's control and that the breach of the peace was not beyond the control of the licensee and resulted from his improper supervision of persons permitted to be on the licensed premises or premises under his control. TEX. ALCO. BEV. CODE ANN. § 69.13.

* * * * *

The provisions of this code applicable to the cancellation and suspension of a retail dealer's off-premises license also apply to the cancellation and suspension of a wine and beer retailer's off-premises permit. TEX. ALCO. BEV. CODE ANN. § 26.03(b).



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allowed to pay a civil penalty in lieu of any suspension in the amount of \$750.00.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 26, and 69, 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 October 22, 2004, 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 Murad Fazli. The hearing concluded and the record closed on that same day.

II. EVIDENCE

Respondent holds a Wine and Beer Retailer's Off-Premises Permit, BQ-439738, issued by TABC for Respondent's premises, Come N Go, located at 1401 Cooks Lane, Fort Worth, Texas. TABC Staff alleged that on August 24, 2003, Respondent's employee, Deepu Krishnan, allowed a breach of the peace on the licensed premises when Mr. Krishnan threatened a customer, Jenny Zacarias, with throwing a beer can through the windshield of Ms. Zacarias' car. Tana Travis, Murad Fazli, and Jenny Zacarias testified at the hearing.

Jenny Zacarias testified that she had gone into Respondent's business on August 23, 2003, to purchase a Diet Coke. The Diet Coke container that she selected from the refrigerated cooler did not feel cold, so she stopped at the drink fountain and also got a cup and ice. Ms. Zacarias said she approached the counter to pay for her drink. A clerk, Deepu Krishnan, was behind the counter operating the cash

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register. Ms. Zacarias said that Mr. Krishnan told her the Diet Coke was \$.60 and the cup with ice was \$.50.

At that point, Ms. Zacarias said she told Mr. Krishnan that she did not want the cup of ice, but Mr. Krishnan insisted that she must pay for both items. Ms. Zacarias said that she put \$1.00 on the counter, took the Diet Coke, and went outside the store to her car leaving the cup of ice on the counter. Ms. Zacarias stated the Mr. Krishnan followed her out to her vehicle. She said that he was holding a tall can of beer in his hand and yelling at her that if she did not come back into the store and pay for both of the items, then he would throw the beer can through her vehicle's windshield. Ms. Zacarias stated that she rolled her car window down and tried to give Mr. Krishnan another \$1.00, but he would not take it from her. Mr. Krishnan continued to insist that she must come back inside the store and place the money on the counter. Ms. Zacarias said she was shocked by Mr. Krishnan's conduct and feared he was crazy, so she went back inside the store and did as he demanded.

Once she was back outside the licensed premises and in her car, Ms. Zacarias said that she drove around the corner of the building and called the police. According to Ms. Zacarias, a police officer came and took a statement from her. The officer said he would contact Mr. Krishnan, and she was allowed to leave at that point.

Ms. Zacarias said she thought Mr. Krishnan's response was extreme in relation to the situation. She acknowledged that the cup of ice could not be restocked and sold, but opined that a warning from Mr. Krishnan that he would charge her for a cup of ice in the future would have been more appropriate.

Tana Travis, a TABC Agent, said that she received a copy of the police report filed by Ms. Zacarias on August 24, 2003. After her review of the report, she determined an enforcement action against Respondent was warranted. Agent Travis said that Mr. Krishnan, as an employee of a licensed premises, should have been in better control of his emotions while operating Respondent's business. In Agent Travis' opinion, Mr. Krishnan's actions had further escalated tensions between himself and Ms. Zacarias. Agent

Travis testified that Mr. Krishnan should not have followed Ms. Zacarias outside to her car or threatened to damage her property with a beer can. According to Agent Travis, Mr. Krishnan should have called the police if he wanted to pursue action against Ms. Zacarias for failure to pay for the cup of ice. In summing up her testimony, Agent Travis stated that she thought a suspension of Respondent's permit for a period of ten days, or a civil penalty in the amount of \$1500.00, was appropriate.

Murad Fazli, Respondent's agent, testified that he was not at the licensed premises at the time this incident occurred; however, Mr. Krishnan had told him about the incident. According to Mr. Fazli, Mr. Krishnan said that he had followed Ms. Zacarias out of the store when she refused to pay for the cup and ice. However, Mr. Krishnan denied that he threatened Ms. Zacarias. Mr. Fazli said that the criminal complaint, which was filed against Mr. Krishnan as a result of this incident, had been dismissed.

Mr. Fazli suggested that Ms. Zacarias seemed to be an emotional individual. He thought that perhaps she had been more upset than the average person considering the small amount of money (\$.50) that was involved. He also said that Respondent's business had frequently been victimized by people taking items from the store without paying. Mr. Fazli said that he and Respondent's other agents or employees regularly called the police concerning thefts, but he did not think that the amount in this case should have warranted a police officer's time in making a theft report.

III. ANALYSIS

The issues to be determined concerning this alleged violation are:

1. Whether a breach of the peace occurred on Respondent's licensed premises;² and

² Premises means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person. TEX. ALCO. BEV. CODE ANN. § 11.49(a). See also TEX. ALCO. BEV. CODE ANN. § 1.04(19).

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2. If so, whether the breach of the peace was not beyond the control of Respondent³ and resulted from Respondent's improper supervision of persons permitted to be on the licensed premises or on a premises under his control. TEX. ALCO. BEV. CODE ANN. § 69.13

Evidence presented in this matter established that a breach of the peace occurred on Respondent's licensed premises on August 23, 2003. "Breach of the peace," is not defined by the Code or TABC Rules. However, it has been judicially defined in case law as an act that disturbs or threatens to disturb "the tranquility enjoyed by the citizens" and includes actual or threatened violence as an essential element. Woods v. State, 213 S.W.2nd 685 (Tex.Crim.App.1948).

After assessing the evidence presented by both sides, the ALJ believes that Respondent's employee, Mr. Krishnan, did threaten violence toward Ms. Zacarias and her property while she was in her vehicle parked outside Respondent's licensed premises. From Ms. Zacarias' testimony, the ALJ doubts that she would have voluntarily re-entered Respondent's store to pay for an item that she had already declined to purchase, but for Mr. Krishnan threatening to throw a beer can from the licensed premises through her vehicle's windshield. Ms. Zacarias was upset and frightened by Mr. Krishnan's actions, which was still evident from Ms. Zacarias' testimony given at a time considerably after this event's occurrence.

Respondent, the holder of a TABC-issued permit, is responsible for the actions of its agents and employees while they are on the licensed premises. It is undisputed that Mr. Krishnan was Respondent's employee at the time of this incident. Accordingly, Mr. Krishnan's actions are attributable to Respondent.

This breach of the peace was not beyond the control of Respondent. According to the testimony of Mr. Fazli, Respondent's agents and employees had reported several instances of theft from the licensed premises to law enforcement authorities prior to this incident. That course of conduct, as correctly pointed

³ Permittee means... the holder of a permit provided for in this code, or an agent or employee. TEX. ALCO. BEV. CODE ANN. § 1.04 (11).

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out by TABC Agent Travis, would have been more appropriate, as opposed to Mr. Krishnan's escalation of an already tense situation between himself and Ms. Zacarias. Proper supervision of Respondent's agents and employees should have included establishing a policy for Respondent's agents and employees to utilize when confronted with a patron's refusal to pay for Respondent's merchandise. The ALJ believes that any procedures Respondent could have outlined for its employees and agents would not be likely to include using force or threat of force against persons. Such a policy would have exposed Respondent's own agents and employees to a foreseeable and unreasonable risk of harm, including injury or death.

During Mr. Fazli's testimony, he also suggested that the penalty sought by TABC Staff was unduly harsh. He pointed out ameliorating factors that the ALJ is willing to consider when recommending any penalty to be assessed in this matter.⁴ These factors are discussed below.

First, the ALJ recognizes that businesses such as Respondent's are frequently the targets for theft. Again according to Mr. Fazli, Respondent and its agents and employees had reported thefts in the past. Unfortunately, the efforts described by Mr. Fazli had been ineffective in curtailing the problem. Ms. Zacarias had rendered property of Respondent unusable for resale. She had also refused to pay for a portion of that property's value when asked to do so, an action which technically might be viewed by some as theft irrespective of the small dollar amount involved. Despite Ms. Zacarias' questionable conduct, Mr. Krishnan's response was excessive and contrary to statutory and regulatory provisions governing the conduct for persons operating a TABC-licensed premises. Nevertheless, the ALJ believes it is understandable that Respondent and Respondent's agents or employees would feel a certain measure of frustration, which possibly contributed to Mr. Krishnan's overreaction when confronted with this situation. Fortunately no actual physical harm or property damage resulted from Mr. Krishnan's inappropriate actions. As a result, the ALJ has considered these factors in assessment of the penalty recommended against Respondent.

⁴ TEX. ALCO. BEV. CODE ANN. §§ 11.61, 11.64 and 11.641.

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Second, no evidence was produced establishing that Respondent had any reason to know that Mr. Krishnan would act in the manner as determined by the ALJ occurred in this instance. Again, Mr. Fazli's testimony discussed the numerous police reports that have been filed on behalf of Respondent by its agents and employees. While the ALJ has determined that the Respondent is ultimately responsible for the conduct of its employees, based upon this and the information discussed below, the ALJ finds that this Mr. Krishnan's conduct was an isolated incident, and not a pattern of employee behavior condoned, encouraged, or directed by Respondent in the operation of the licensed premises. As such, these factors must also be weighed in determining the penalty assessed in this case.

Lastly, the ALJ has reviewed Respondent's licensing history. TABC Staff has sought the minimum penalty that it is authorized to negotiate in a settlement of this matter with Respondent, namely a 10-day permit suspension, or a \$1,500.00 civil penalty paid in lieu of any suspension. While there were warnings listed on Respondent's violation history for miscellaneous violations, the ALJ notes that this violation is the only instance involving an infraction deemed under the TABC Staff's penalty chart⁵ to be a health, safety, or welfare violation. Accordingly, based upon factors cited within this section, the ALJ recommends a lesser penalty be imposed against Respondent.

IV. RECOMMENDATION

The ALJ recommends that Respondent's permit be suspended for a period of five days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$750.00.

V. PROPOSED FINDINGS OF FACT

1. ABC Group, Inc. d/b/a Come N Go (Respondent) holds a Wine and Beer Retailer's Off-Premises Permit, BQ 439738, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 1401 Cooks Lane, Fort Worth, Tarrant County, Texas.

⁵ 16 TEX. ADMIN. CODE § 37.60.

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2. On August 24, 2003, Respondent's employee, Deepu Krishnan, was operating the licensed premises described in Finding of Fact No. 1.
3. On that day, Jenny Zacarias was a customer at Respondent's business.
4. Ms. Zacarias entered the licensed premises to purchase a Diet Coke; the Diet Coke did not feel cold, so Ms. Zacarias took a cup of ice from the fountain area and approached Mr. Krishnan to pay for her purchase.
5. Mr. Krishnan informed Ms. Zacarias that the Diet Coke was \$.60 and the cup of ice was \$.50.
6. Ms. Zacarias refused to pay for the cup of ice and left \$1.00 on the counter.
7. Ms. Zacarias took the Diet Coke and exited from the store leaving the cup of ice on the counter.
8. Mr. Krishnan followed Ms. Zacarias outside to her car and threatened to throw a beer can from the licensed premises through her vehicle's windshield unless Ms. Zacarias came back into the store and paid the remaining amount owed for the cup of ice.
9. Ms. Zacarias was frightened, but returned to the store and left another \$1.00 on the counter.
10. Ms. Zacarias returned to her car and telephoned the police.
11. A police officer responded to the licensed premises, spoke to both Ms. Zacarias and Mr. Krishnan, and filed a report concerning the matter.
12. The police officer's report was forwarded to TABC Staff.
13. Upon review of the police report discussed in Findings of Fact Nos. 11 and 12, TABC Staff determined that a breach of the peace had occurred on Respondent's licensed premises, and commenced this enforcement action against Respondent.
14. Respondent's licensing history shows a few miscellaneous violations, but this violation is the only instance involving an infraction deemed under the TABC Staff's penalty chart to be a health, safety, or welfare violation.
15. A hearing in this matter was conducted on October 22, 2004, at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas. ALJ Tanya Cooper presided. TABC Staff was represented by TABC Staff Attorney, Timothy Griffith. Respondent was represented by Murad Fazli. The hearing concluded and the record closed on that day.

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VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 26, §§ 6.01, 11.61, and 69.13, and 16 TEX. ADMIN. CODE § 31.1 *et. seq.*
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 2001.520.
4. Based upon Proposed Findings of Fact Nos. 2 - 9, Respondent allowed a breach of the peace on the licensed premises, which was not beyond Respondent's control and resulted from improper supervision of a person permitted to be on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN. § 69.13.
5. Based on the foregoing Proposed Findings of Fact Nos. 2 - 9 and 14 and Conclusion of Law No. 4, Respondent's Wine and Beer Retailer's Off-Premises Permit, BQ-439738, issued by TABC should be suspended for a period of five days, or in lieu of any suspension, Respondent should be allowed to pay a civil penalty in the amount of \$750.00.

SIGNED November 10, 2004.


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: ABC Group, Inc. d/b/a Come N Go

DOCKET NUMBER: 458-04-8612

AGENCY CASE NO: 607951

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

AGENCY COUNSEL
BY FAX

Betty Chatham
Fax: 512/206-3498

AGENCY LEGAL STAFF
BY FAX

ABC Group, Inc.
d/b/a Come N Go
1401 Cooks Lane
Fort Worth, Texas 76120

RESPONDENT
BY MAIL

As of August 25, 2004