

copy 8-31-05

DOCKET NO. 610405

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	
T-N-T'S SPORTS PAGE	§	
D/B/A T-N-T'S SPORTS PAGE	§	OF
PERMIT/LICENSE NOS. N229283, NL229284, PE229285	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-2991)	§	ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 10th day of August, 2005, 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 the 30th day of March, 2005 and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 17th day of June, 2005. The Proposal For Decision, attached 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. Exceptions were filed in this cause.

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 your permits and/or licenses are hereby **CANCELLED FOR CAUSE**, effective October 9, 2005.

This Order will become final and enforceable on the 31st day of August, 2005, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by the manner indicated below.

SIGNED this the 10th day of August, 2005, at Austin, Texas.

On Behalf of the Administrator,



Jeanrene 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

David C. Hill
ATTORNEY FOR RESPONDENT
VIA FAX (214) 706-9023

T-N-T'S SPORTS PAGE
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Timothy Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office



SOAH DOCKET NO. 458-05-2991

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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§

BEFORE THE STATE OFFICE

V.

OF

T-N-T'S SPORTS PAGE,
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against T-N-T's Sports Page (Respondent). Petitioner alleged that Respondent has entered into a device, scheme or plan which has surrendered control of the premises or business of Respondent to a person or persons other than Respondent, in violation of the Texas Alcoholic Beverage Code (the Code). Petitioner requested that Respondent's permits be canceled. The Administrative Law Judge (ALJ) recommends cancellation of the permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01, 11.61 and 109.53. 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 proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On December 20, 2004, Petitioner issued its notice of hearing, directed to Respondent, via certified mail, return receipt requested. 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 was successfully delivered to Respondent, as evidenced by the signature on

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the return receipt.

On March 30, 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, Staff Attorney. Respondent appeared and was represented by its attorney, David Hill. Following presentation of evidence, the hearing ended on March 30, 2005. The record was closed on April 18, 2005, after written arguments were filed.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

TABC may suspend or cancel a permit if it is found that a permittee has violated a provision of the Code or a Rule of the Commission.¹ The Code declares that

It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices.

Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.²

¹ § 11.61(b)(2) of the Code.

² § 109.53 of the Code.

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B. Background

The following was undisputed by the parties. Respondent holds private club registration permit N 229283, private club late hours permit NL 229284, and beverage cartage permit PE 229285, issued by Petitioner on May 8, 1992, for its premises located at 14902 Preston Road Suite 716, Dallas, Dallas County, Texas. Martin Miller serves as Respondent's president.

T-N-T Sports Page, Inc. (the restaurant) is the management company for Respondent. Respondent's original application filed with TABC included a Management Contract in which Respondent agreed to pay management fees to the restaurant. It also included a Sublease Agreement which provided that Respondent would pay sublease fees to the restaurant. Mr. Miller is also the owner/operator of the restaurant.

C. Evidence and Contentions**1. Petitioner's case**

Petitioner contends that Respondent operated a subterfuge and surrendered control of its premises to someone other than Respondent. Specifically, the restaurant was exercising financial and operational control over the business instead of Respondent. In support of its position, Petitioner presented the testimony of Cheryl Belvedere, a compliance officer with TABC since 1996.

a. Testimony of Cheryl Belvedere

As a compliance officer and CPA, Ms. Belvedere routinely conducts audits and reviews the documents of private clubs as required by the Code. Ms. Belvedere stated that on June 4, 2003, she personally met with Mr. Miller for a comprehensive interview as a result of the change

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in Respondent's officers.³ During the interview, which lasted approximately two hours, all of the record keeping requirements of a private club were covered in detail. One of the first items discussed was the requirement that Respondent obtain a separate tax identification number from the IRS in order to file its own tax return.

Specific record keeping requirements regarding how the membership and accounts of private clubs should be maintained were discussed. Various types of record keeping problems were also covered during the interview. According to Ms. Belvedere, she informed Mr. Miller of what she specifically looks for when she does an audit and what constitutes subterfuge. She also informed him of the fact that if subterfuge is discovered, the permit is subject to cancellation.

On March 8, 2004, almost nine months after meeting with Mr. Miller regarding the required record keeping for private clubs, Ms. Belvedere conducted an audit of Respondent's records.⁴ Based on this inspection, she determined the restaurant to be in control of the licensed premises. The basis for the determination is listed as follows:

- When she requested Respondent's IRS tax return for the period ending April 30, 2003, she was provided the restaurant's return. Respondent's revenues and expenses were claimed on the restaurant's return.
- Respondent's funds were commingled with the funds of the restaurant account.
- According to the Management Contract filed with TABC, Respondent agreed to pay management fees to the restaurant. However, no management fees were paid.
- According to the Sublease Agreement filed with TABC, Respondent agreed to pay sublease fees to the restaurant. However, no sublease fees were paid.

³ TABC Exhibit Three is a copy of the Acknowledgment of Record Keeping Requirements signed by Mr. Miller (evidencing receipt and understanding of the topics explained by the interviewer) and Ms. Belvedere on June 4, 2003.

⁴ Respondent's Exhibit One is a copy of Ms. Belvedere's two-page audit report prepared on March 8, 2004.

- The restaurant paid Respondent's gross receipts tax.
- The restaurant's tax identification number was listed on Respondent's gross receipts reports.
- The restaurant's name and tax identification number were listed on Respondent's bank signature cards.
- Respondent's bank signature card also listed the owner of the restaurant, Mr. Miller, as the owner of Respondent.

Ms. Belvedere testified that Respondent should have been in control of the premises. The private club is owned by the members. The officers are primarily there as elected officials to manage the club. The fact that Respondent is a non-profit organization does not mean it does not have to pay taxes. Respondent should have filed a separate tax return under its own tax identification number obtained from the IRS. Respondent, as a private club, is a separate entity and is required to have its own separate bank accounts (operating account and alcoholic beverage replacement account). The tax identification number on the accounts should have been that of Respondent. Respondent's name should have been listed as the account title on the bank signature cards.

According to Ms. Belvedere, Respondent and the restaurant, like other entities in the market, are required to operate at arms length. Pursuant to the Management Contract and the Sublease Agreement, Respondent was obligated to pay the restaurant for its services and for rent. Failure to do so is evidence of a subterfuge. Respondent is responsible for its own gross tax expenses. Respondent's tax identification number should have been on the gross receipts reports.

Ms. Belvedere also stated, that pursuant to § 32.06(c) of the Code,⁵ it is permissible for Respondent and the restaurant to commingle or share a master account if the account is maintained in accordance with generally accepted accounting principles and Respondent is able to generate statements reflecting the funds allocated to each component account, *i.e.*, an operating account

5 Respondent's Exhibit Three.

for the restaurant, an operating account for Respondent, and a pool replacement account for Respondent. However, in this case, Respondent failed to maintain separate ledgers and therefore, was unable to produce any statements reflecting the funds allocated to each component account. Instead, the operating account for the restaurant and the replacement account for Respondent were shown to have been shared by Respondent and the restaurant.

According to Ms. Belvedere, a private club establishes a designated percentage of funds to be allocated to the pool replacement account. In this case, Respondent had designated a percentage of 28 percent. However, the actual amount deposited by Respondent exceeded 28 percent and the replacement of alcoholic beverages was paid by the restaurant in violation of the Code.⁶ In Ms. Belvedere's opinion, the commingling activity between Respondent and the restaurant would not fall within generally accepted accounting principles.

2. Respondent's case

Respondent denies that it has engaged in a subterfuge. Respondent argues that this is not a subterfuge case, but a record keeping case in violation of § 32.06 (c) of the Code. Respondent acknowledges that although it may not have maintained its records in the manner specifically requested by Petitioner in the past, it has incorporated all of Ms. Belvedere's recommendations as a result of the audit and is currently in compliance. The violations, however, do not rise to the level of subterfuge, requiring cancellation of the permits.⁷

According to Respondent, it was properly operating as a private club at the time of the audit, as required by the Code, in that it maintained membership lists and records of the regular

⁶ §§ 32.06(b)(2) and (3) of the Code.

⁷ Respondent's Exhibit Two is a copy of a portion of TABC's Standard Penalty Chart (the chart). Respondent acknowledges that, pursuant to the chart, the only remedy for subterfuge is cancellation. However, Respondent argues that, in this case, the proper sanction for a first offense of improper record keeping in violation of § 32.06 of the Code (including membership records, pool and replacement accounts) is a warning or a three-day suspension.

meetings of officers and members. Respondent also had a Management Contract and Sublease Agreement which were reviewed and approved by TABC. In support of its position, Respondent presented the testimony of three witnesses.

a. Testimony of Martin Miller

Mr. Miller confirmed that he attended the compliance interview conducted by Ms. Belvedere in June 2003 and that he attempted to incorporate the information into the practices of the private club. The main thing that he learned was that Respondent needed to open a pool replacement account. Respondent opened the account and started depositing 30 percent into the account. Mr. Miller stated at the hearing that he did not see the need to open a separate operating account for Respondent at the time because the Management Contract specified that Respondent could have a single account and he had seen a single master account referenced in other TABC material. Mr. Miller opined that opening an operating account for Respondent would have made matters more confusing. He admitted that Respondent had no separate operating account at the time the audit was conducted.

Mr. Miller admitted having received written materials during the interview. He first stated that everything was clearly explained, then later stated that the information regarding the various accounts was very confusing, even for Ms. Belvedere. According to Mr. Miller, everything seemed simpler by merely having only one account to pay for everything. He stated that he understood, however, that the restaurant and Respondent were separate entities. Respondent was not operated as a subterfuge for his benefit.

b. Testimony of Sandy Miller

Mrs. Miller testified that she is married to Mr. Miller and does all of the paperwork for both Respondent and the restaurant. She worked for the previous management for ten years and has worked for the current management for two years. Mrs. Miller stated that her current

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responsibilities include maintaining the operating account and the pool replacement account for Respondent, maintaining the operating account for the restaurant and disbursing the funds to ensure that the required 28 percent is deposited into the replacement account and 45 percent is paid to the management company.

Mrs. Miller stated, however, that at the time Mr. Miller attended the TABC compliance interview on June 4, 2003, there was only a single account (the operating account for the restaurant) being used for both Respondent and the restaurant because it was believed the Management Agreement allowed them to operate out of the one account. Mr. Miller immediately opened the replacement account for Respondent upon returning from the interview.

Prior to the audit, Mrs. Miller was just learning to use a spread sheet and believed she was doing a good job in her day-to-day record keeping for the two entities because she could account for every penny. According to Mrs. Miller, she showed the spreadsheet to Ms. Belvedere, who stated that she kept good records, but did not include enough information. Ms. Belvedere showed Mrs. Miller exactly what needed to be done, *i.e.*, add the replacement account percentage and management fee to the spreadsheet. Respondent's records are now in compliance.

Mrs. Miller also stated that there was no operating account established for Respondent at the time of the audit because Respondent was not aware that it needed such an account and believed that the Management Contract allowed it to operate out of the one operating account for the restaurant. Respondent opened the operating account for Respondent after Ms. Belvedere conducted the audit and informed them that a separate account was needed.

According to Mrs. Miller, Respondent was robbed on November 9, 2003.⁸ Respondent had to close its existing replacement account and open a new one. The bank erroneously listed the restaurant instead of Respondent on the bank signature cards for the new account. The bank also erred in listing Mr. Miller as the owner rather than the officer on Respondent's bank

⁸ Respondent's Exhibit Five, Dallas Police Department Incident Report, dated November 20, 2003.

signature cards. Mrs. Miller stated that the errors were not realized until Ms. Belvedere pointed them out during the audit. Mrs. Miller corrected the errors at the bank the same day and opened the operating account for Respondent.

Mrs. Miller testified that Ms. Belvedere informed her on the date of the audit that Respondent could not have time to comply with the Code since Mr. Miller had attended the compliance interview in June 2003. Instead, Ms. Belvedere would recommend that Respondent's permits be cancelled. According to Mrs. Miller, Respondent had been audited twice previously, but had never had its permits cancelled, even though the previous management company did not have the proper accounts set up.

Finally, Mrs. Miller stated that at the time of the audit, the incorrect tax identification number was included on Respondent's pre-printed tax forms prepared by the Comptroller's Office. However, this error was not detected until Ms. Belvedere pointed it out. The error was corrected. Respondent and the restaurant now have separate tax identification numbers. According to Mrs. Miller, the whole process remains very confusing, however, Respondent did not intend to engage in a subterfuge.

c. Testimony of Greg Williams .

Mr. Williams testified that he is a CPA and is familiar with the generally accepted accounting practices. His first dealing with Respondent was in November 2003 after the audit. He stated that when he originally reviewed Respondent's 2003 books, there was a separate operating account in existence for Respondent. However, Respondent is currently in compliance in managing the three component accounts.

Mr. Williams also prepared Respondent's 2003 tax return. According to Mr. Williams, he only prepared one tax return for both entities because Respondent's books reflected no separate transactions for distinguishing the separate accounts for Respondent versus the restaurant.

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Therefore, he decided to put everything on one tax return to save time and effort for himself, Respondent and the restaurant. It was not an attempt to create a subterfuge. Mr. Williams opined that Respondent did not intend to engage in a subterfuge. Respondent merely continued with previously established bare method of accounting.

Finally, Mr. Williams stated that generally, a non-profit association such as Respondent does not have to file a tax return with the IRS, but would need to file Form 1120. Respondent's practices have been changed to reflect the separate filing of Form 1120.

D. Analysis

As a result of having attended the comprehensive interview sponsored by TABC approximately nine months prior to the audit, Mr. Miller knew, or should have known the appropriate requirements for operating a private club. Inspection of Respondent's records on June 4, 2003, indicated that Respondent had not paid any rent for the premises. Nor had Respondent paid any management fees.

Respondent also failed to implement an appropriate method of accounting for funds commingled between the restaurant and Respondent. It is undisputed that at the time of the audit, Respondent failed to generate statements reflecting the funds allocated to each of the three required component accounts because only two accounts were in existence (Respondent's replacement account and the restaurant's operating account). Respondent had no separate operating account in existence at the time. Therefore, Respondent was not maintaining a single master account in accordance with generally accepted accounting principles pursuant to § 32.06(c) of the Code.

Respondent's argument that this is merely a case of record keeping violations is not persuasive. Nor does the ALJ find the explanations provided by Mr. and Mrs. Miller to be credible or persuasive. Respondent has an obligation to know and abide by the provisions of the

Code, and is accountable for failing to meet this obligation. The obligation exists whether Respondent is warned of a violation by TABC and given a chance to correct it or not. According to Ms. Belvedere, subterfuge as well as the other audit violations were discovered.

The ALJ concludes that Petitioner's evidence showing subterfuge is more convincing than the evidence presented by Respondent. It appears from the totality of the factors considered that Respondent was not operating independently and free of the restaurant's control, but in a manner that constitutes a serious violation of the Code. Therefore, the ALJ recommends that Respondent's permits be cancelled.

III. FINDINGS OF FACT

1. Respondent (T-N-T Sports Page) holds private club registration permit N 229283, private club late hours permit NL 229284, and beverage cartage permit PE 229285, issued by Petitioner on May 8, 1992, for its premises located at 14902 Preston Road Suite 716, Dallas, Dallas County, Texas.
2. Martin Miller serves as Respondent's president.
3. T-N-T Sports Page, Inc. (the restaurant) is the management company for Respondent.
4. Mr. Miller is also the owner/operator of the restaurant.
5. On June 4, 2003, Mr. Miller attended a comprehensive interview with TABC in which all of the record keeping requirements of a private club were covered in detail.
6. Subterfuge was also discussed during the interview with TABC.
7. Approximately nine months after the interview, TABC compliance officer, Cheryl Belvedere, conducted an audit of Respondent's records.
8. Ms. Belvedere determined the restaurant to be in control of the licensed premises. The basis for the determination is listed as follows:
 - Respondent's revenues and expenses were claimed on the restaurant's tax return.
 - Respondent's funds were commingled with the funds of the restaurant

account.

- According to the Management Contract filed with TABC, Respondent agreed to pay management fees to the restaurant. However, there was no evidence to show any management fees were paid.
- According to the Sublease Agreement filed with TABC, Respondent agreed to pay sublease fees to the restaurant. However, there was no evidence that any sublease fees were paid.
- The restaurant paid Respondent's gross receipts tax.
- The restaurant's tax identification number was listed on Respondent's gross receipts reports.
- The restaurant's name and tax identification number were listed on Respondent's bank signature cards.
- Respondent's bank signature card also listed the owner of the restaurant, Mr. Miller, as the owner of Respondent.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Chapter 5 and §§ 6.01, 11.61 and 109.53.
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. Chapter 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent commingled funds with the restaurant in violation of TEX. ALCO. BEV. CODE ANN. § 32.06(c).
5. A preponderance of the evidence shows that Respondent surrendered control of the business to a person other than Respondent in violation of TEX. ALCO. BEV. CODE ANN. §109.53.
6. Respondent's permits should be canceled.

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SIGNED June 17, 2005.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. T-N-T's Sports Page

DOCKET NUMBER: 458-05-2991

AGENCY CASE NO: 610405

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Dallas, TX 75254-9108

RESPONDENT
VIA REGULAR MAIL

as of June 17, 2005

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 17, 2004

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

RE: TABC Vs. T-N-T'S Sports Page
SOAH Docket # 458-05-2991
TABC CASE NO. 610405

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

Administrative Law Judge
Brenda Coleman

BC/sr
Enclosure

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, Via Fax;
David C. Hill, Respondent's Attorney, Via Fax; T-N-T's Sports Page, Respondent, Via
Mail