

DOCKET NO. 613069

IN RE LA HACIENDA RESTAURANT	§	BEFORE THE TEXAS
AND CANTINA	§	
D/B/A LA HACIENDA RESTAURANT	§	
AND CANTINA	§	
PERMIT NO. N445435	§	
	§	ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1429)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 20th day of June, 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 March 10, 2006, 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 May 8, 2006. 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 cancelled for cause, pursuant to §16 TAC §§41.49(b)(3) and 41.52(c)(1)(B) of the Rules; §§32.03 and 32.06 and §109.53 of the Code.**

This Order will become final and enforceable on July 11, 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 20th day of June, 2006, at Austin, Texas.

On Behalf of the Administrator,



Jeanne Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

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

La Hacienda Restaurant & Cantina
d/b/a La Hacienda Restaurant & Cantina
RESPONDENT
3514 Wellington St.
Greenville, TX 75401
CERTIFIED MAIL NO. _____
RETURN RECEIPT REQUESTED

Tim Griffith
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4001

Licensing Division
Dallas District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 08, 2006



TG+
~~protest~~
subterfuge
prid se

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

RE: Docket # 458-06-1429
TABC VS. LA HACIENDA RESTAURANT AND
CANTINA
D/B/A LA HACIENDA RESTAURANT AND
CANTINA

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,
La Hacienda Restaurant and Cantina, Respondent, Via Mail

SOAH DOCKET NO. 458-06-1429

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § §	BEFORE THE STATE OFFICE
V.		OF
LA HACIENDA RESTAURANT AND CANTINA, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Petitioner) brought this enforcement action against La Hacienda Restaurant and Cantina (Respondent). Petitioner alleged that Respondent has committed several violations of the Texas Alcoholic Beverage Code (the Code) and the rules of the Commission (the Rules), including having entered into a device, scheme or plan which has surrendered control of the premises or business of Respondent to one other than Respondent. Petitioner requested that Respondent's permits be canceled. The Administrative Law Judge (ALJ) recommends cancellation of the permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (TABC or Commission) has jurisdiction over this matter pursuant to ch. 5 and §§ 6.01, 11.61, 32.03, 32.06 and 109.53 of the Code, as well as §§ 41.49 and 41.52 of 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 proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

On March 10, 2006, a hearing convened in Dallas, Texas, before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Petitioner was represented at the hearing by Timothy Griffith, Staff Attorney. Respondent appeared *pro se*. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

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II. DISCUSSION AND ANALYSIS

A. Background

Respondent's licensed premises are located at 3514 Wellington Street, Greenville, Hunt County, Texas. Respondent holds private club registration permit N-445435 and beverage cartage permit PE-445436 issued by the TABC on February 9, 1999. Raul Compos is one of Respondent's owners.

B. Applicable Law

Pursuant to the Code, Petitioner may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or the Rules.¹ Chapter 32 of the Code, and chapters 41.49 and 41.52 of the Rules pertain to record keeping for private clubs, including membership records, pool accounts and replacement accounts. No application for membership may be approved until the application has been filed with the membership committee chairman or board and then approved by the chairman.² When considering a membership application or termination of memberships, the membership committee must keep written minutes showing the meeting date, the names of all committee members present, the name of any person admitted to membership, and the name of any person whose membership was terminated.³ A private club is required to prepare a record with entries made in chronological order showing the following about temporary membership cards issued: the date issued, the name of the person to whom the card was issued, and the serial number of the temporary membership card.⁴

The replacement of all alcoholic beverages must be paid for either by money assessed equally

¹ Code § 11.61(b)(2).

² Code § 32.03(d).

³ 16 TAC § 41.52(c)(1)(B).

⁴ 16 TAC § 41.49(b)(3).

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from each member and collected in advance or by the establishment of an alcoholic beverages replacement account in which a designated percentage of each charge for the service of alcoholic beverages, as determined by the club's governing body, is deposited.⁵ No money other than the designated percentage of service charges may be deposited in the replacement account.⁶ The replacement of alcoholic beverages may be paid for only from money in the replacement account.⁷ A private club may combine the club's alcoholic beverages replacement account, general operating account, and any other account into a single master account if the master account is maintained in accordance with generally accepted accounting principles and the club is able to generate statements reflecting the funds allocated to each component account.⁸

A private club must own, lease, or rent a building, or space in a building that is determined by TABC to be suitable and adequate for the club's members and guests.⁹ The club's affairs and management must be conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting.¹⁰ Any device, scheme or plan which surrenders the permittee's control of the employees, premises or business to other persons is unlawful. The legislature has expressed its intent

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.¹¹

5 Code § 32.06(a).

6 Code § 32.06(b)(2).

7 Code § 32.06(b)(3).

8 Code § 32.06(c).

9 Code § 32.03(f).

10 Code § 32.03(i).

11 Code § 109.53.

Pursuant to TABC's Standard Penalty Chart, the only remedy for subterfuge is cancellation.¹²

C. Petitioner's Evidence and Contentions

Petitioner contends that Respondent has operated its premises in violation of the Code and the Rules. Petitioner also contends that Respondent operated a subterfuge and surrendered control of its premises to someone else. In support of its position, Petitioner presented the testimony of John Norwood, a compliance officer with TABC since 1969. As a compliance officer, Mr. Norwood routinely conducts audits and reviews the documents of private clubs as required by the Code. On November 19, 2004, he conducted a routine audit of Respondent's records.

1. Improper Record Keeping Violations

During the audit, Mr. Norwood detected that Respondent failed to maintain a record of the temporary membership cards used and that Respondent's minutes were not signed by the members of the membership committee. According to Mr. Norwood, a private club's pool account is the money used to replace its alcoholic beverages. A private club must establish a designated percentage of funds to be allocated to the pool replacement account and the club should be consistent in depositing the designated percentage. If the governing body of the club changes the designated percentage, it should document the change in the minutes of the club. Such a change should be on file with TABC. In this case, however, Respondent's designated replacement account percentage was not deposited into the pool account.

2. Subterfuge

Mr. Norwood determined that Respondent failed to conduct its business as a private club in accordance with its by-laws, management agreement and sublease agreement. Failure to do so is evidence of a subterfuge. Mr. Norwood testified that Respondent, as a private club, is a

¹² 16 TAC § 37.60(a).

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separate entity owned by the members. A sublease agreement is an agreement between the club (the lessee) and the restaurant (the lessor) for the club to use the restaurant's facility. A management contract is also needed to manage the club. Therefore, Respondent was required to submit a management agreement and a sublease agreement to TABC upon application for a private club permit. Mr. Norwood could not find any evidence to show that the club was paying the landlord for the use of the facility. Nor was there any evidence that the club was paying the specified management fee indicated by the management agreement for management of the business.

Mr. Norwood also testified that review of the records for the restaurant and the private club indicated that the private club had a separate account set up for the replacement of its alcoholic beverages; however the money from the club was commingled with the money from the restaurant. Neither the operating account nor the general account was consistently utilized. Mr. Norwood also observed that the only income tax return submitted to the federal government was the one return for the restaurant, which included Respondent's revenues from the private club. Respondent should have filed a separate tax return with the IRS since the private club is a separate entity.

D. Respondent's Evidence and Contentions

Mr. Compos testified at the hearing on behalf of Respondent. Mr. Compos did not dispute Petitioner's allegations but attempted to offer explanations instead. He stated that after one of the three partners left, the others tried to operate the club as required. However, they were working long hours in the kitchen from 8 a.m. to 11 p.m. By the time the shift was over, it was hard for them to do the necessary paperwork. The two partners got behind and could not get caught up. According to Mr. Compos, the club is now in the process of going out of business. Mr. Compos stated that he just wants to wrap things up.

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E. Analysis

After considering the evidence, the ALJ concludes that Petitioner has met its burden and has proven that Respondent committed the violations of the Code and the Rules as alleged by Petitioner. Mr. Norwood's audit of Respondent's records on November 19, 2004, indicated that Respondent failed to operate as a private club and that Respondent's ownership or operation was a subterfuge. Respondent's record keeping practices were also inadequate.

III. RECOMMENDATION

Petitioner requested that Respondent's permits be canceled. Subterfuge is a major regulatory violation of the Code, and cancellation is the remedy provided in the Rules for this violation. The ALJ agrees with that sanction, and therefore, recommends that Respondent's permits be canceled.

IV. FINDINGS OF FACT

1. La Hacienda Restaurant and Cantina (Respondent) holds private club registration permit N 445435 and beverage cartage permit PE 445436 issued by Petitioner on February 9, 1999, for its premises located at 3514 Wellington Street, Greenville, Hunt County, Texas.
2. Raul Compos is one of Respondent's owners.
3. On November 19, 2004, TABC compliance officer, John Norwood, conducted an audit of Respondent's records.
4. Respondent failed to properly maintain its membership committee minutes, in that the minutes were not signed by the members of the committee.
5. Respondent failed to maintain a record of its temporary membership cards.
6. Respondent deposited money other than the designated percentage into the replacement account.
7. Respondent failed to operate as a private club, in that no management fees or sublease fees were paid.
8. Respondent co-mingled its money with that of the restaurant.

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9. Respondent did not file a separate income tax return. Instead, the restaurant claimed Respondent's revenues on its income tax return.
10. On February 17, 2006, Petitioner issued a notice of hearing notifying Respondent that a hearing would be held concerning Petitioner's allegations and informing Respondent of the time, place, and nature of the hearing and 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.
11. The hearing was held on March 10, 2006, in Dallas, Dallas County, Texas, before Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Petitioner appeared and was represented by Timothy Griffith, Staff Attorney. Respondent appeared *pro se*. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code), Chapter 5 and §§ 6.01, 11.61, 32.03, 32.06 and 109.53, as well as 16 TEX. ADMIN. CODE (TAC) §§ 41.49 and 41.52 of the Rules of the Commission (the Rules).
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. Based on the foregoing findings and conclusions, Respondent violated 16 TAC §§ 41.49(b)(3) and 41.52(c)(1)(B) of the Rules.
5. Based on the foregoing findings and conclusions, Respondent violated Code §§ 32.03 and 32.06.
6. Based on the foregoing findings and conclusions, Respondent surrendered control of the business to someone other than Respondent in violation of Code §109.53.
7. Based on the foregoing findings and conclusions, Respondent's permits should be canceled.

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SIGNED May 8, 2006.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SERVICE LIST

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. La Hacienda Restaurant and Cantina

DOCKET NUMBER: 458-06-1429

AGENCY CASE NO: 613069

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AGENCY COUNSEL
VIA FAX

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d/b/a La Hacienda Restaurant and Cantina
3514 Wellington Street
Greenville, TX 75401

RESPONDENT
VIA REGULAR MAIL

as of May 08, 2006