

Entered
9-5-05
BC

DOCKET NO. 613352

IN RE PNH L.L.C.	§	BEFORE THE
D/B/A PASSPORT 3030	§	
PERMIT/LICENSE NOS.MB543235,	§	
LB543236	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-5274)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of September, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on June 9, 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 August 4, 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 MB543235 and LB543236, be **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on September 22, 2005 unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile or by mail as indicated below.

SIGNED this 1st day of September, 2005

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (214) 956-8611

PNH L.L.C.
d/b/a Passport 3030
RESPONDENT
1309 Main Street, No. 1707
Dallas, Texas 75202
VIA CM/RRR NO. 7005 0390 0005 7550 2934

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-05-5274

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

v.

**PNH L.L.C D/B/A PASSPORT 3030
DALLAS COUNTY, TEXAS
(TABC CASE NO. 613352)
Respondent**

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**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**



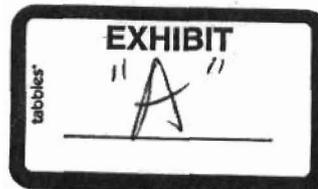
PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this disciplinary action against PNH L.L.C. d/b/a Passport 3030, 3030 Ross Avenue, Dallas, Dallas County, Texas, (Respondent), alleging that on or about October 23, 2004, Respondent or its agent, servant, or employee allowed a breach of the peace on the licensed premises that was not beyond Respondent's control and resulted from Respondent's improper supervision of persons on the premises, and that on or about November 5, 2004, Respondent or its agent, servant, or employee failed to mutilate the identification stamp on an empty bottle of distilled spirits. The Administrative Law Judge (ALJ) finds that Staff has proven the allegations and recommends that Respondent's permits be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On June 9, 2005, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented



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by Timothy Griffith, attorney. Respondent did not appear and was not represented at the hearing. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or administrator may cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Texas Alcoholic Beverage 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.

A. Breach of the Peace

The Commission or administrator may suspend or cancel a mixed beverage permit after giving the permittee notice and the opportunity to show compliance with all requirements of law for the retention of the permit if it finds that a breach of the peace has occurred on the licensed premises or on premises under the control of the permittee and that the breach of the peace was not beyond the control of the permittee and resulted from his improper supervision of persons permitted to be on the licensed premises or on premises under his control. TEX. ALCO. BEV. CODE ANN. § 28.11.

B. Failure to Mutilate Identification Stamp

A holder of a mixed beverage permit or any person employed by the holder who empties a bottle containing distilled spirits shall immediately after emptying the bottle invalidate the identification stamp on the bottle. TEX. ALCO. BEV. CODE ANN. § 28.09(a). The invalidation of identification stamps shall be done by mutilating the stamp. "Mutilate" means to scratch, cut, tear, or abrade in a manner which inflicts obvious and substantial damage to the stamp but does not totally remove or obliterate the stamp. 16 TEX. ADMIN. CODE § 41.72.

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III. EVIDENCE

A. Staff's Evidence and Contentions

Jeff Farmer, an Enforcement Agent for the Texas Alcoholic Beverage Commission (Commission), testified that on October 23, 2004, he and Agent Jeff Peel accompanied employees of the Texas Comptroller's office to Respondent's premises for the collection of nonpayment of taxes. Bryan Lane, Respondent's general manager; Jeffery Trejo, Respondent's employee; and Kenny (last name unknown), the owner of Respondent's establishment were present at Respondent's establishment when they arrived.

Agent Farmer testified that Kenny accused Agent Keel of attempting to confiscate employees' payroll. This incited Mr. Trejo, an employee, to become angry and push Agent Keel, yelling threats and obscenities at him and challenging him to fight. Both Kenny and Mr. Lane, Respondent's general manager, observed the confrontation but did nothing to restrain Mr. Trejo. Mr. Trejo was ultimately subdued by the agents and handcuffed.

On November 5, 2004, Agent Farmer returned to Respondent's premises and observed an empty bottle of gin on the premises with an intact, undamaged, non-mutilated identification stamp affixed to it. The tax stamp had not been scratched, cut, torn, or abraded in any manner.

IV. ANALYSIS

Respondent's employee Mr. Trejo committed a breach of the peace on Respondent's premises by attacking Agent Keel. Respondent's owner, Kenny, incited Respondent's employee to commit the breach of the peace, and Respondent's general manager, Mr. Lane, did nothing to prevent, control, or otherwise stop the breach of the peace. The breach of the peace resulted from

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the owner's and manager's improper supervision of an employee on the premises who was under their control. This constitutes a violation of TEX. ALCO. BEV. CODE ANN. § 28.11.

In addition, the presence of the non-mutilated identification stamp on the empty gin bottle on Respondent's premises constitutes a violation of TEX. ALCO. BEV. CODE ANN. § 28.09(a) and 16 TEX. ADMIN. CODE § 41.72.

V. RECOMMENDATION

Staff requested that Respondent's permits be cancelled because of the physical attack committed on a Commission agent by an employee of Respondent's establishment at the instigation of the owner of Respondent's establishment and in the presence of Respondent's general manager, neither of whom did anything to attempt to control or restrain the attack. Based on the evidence on the record, the ALJ recommends that Staff's request be granted and that Respondent's permits be cancelled.

VI. FINDINGS OF FACT

1. On September 30, 2003, the Commission issued Mixed Beverage Permit, MB-543235, and Mixed Beverage Late Hours Permit, LB-543236, to PNH L.L.C., d/b/a Passport 3030, 3030 Ross Avenue, Dallas, Dallas County, Texas.
2. On October 23, 2004, Commission agents Anthony Keel and Jeff Farmer accompanied employees from the Texas Comptroller's office to Respondent's premises to assist in the collection of nonpayment of taxes. Bryan Lane, Respondent's general manager; Jeffery Trejo Respondent's employee; and Kenny (last name unknown), the owner of Respondent's establishment were present.
3. Kenny, Respondent's owner, incited Mr. Trejo to engage in a breach of the peace by stating that Agent Keel was confiscating the employees' payroll. Mr. Trejo, Respondent's employee, engaged in a breach of the peace by pushing Agent Keel, yelling threats and obscenities at him, and challenging him to fight. Mr. Lane, Respondent's general manager, observed the confrontation and failed to prevent or control Mr. Trejo from engaging in the breach of the peace on Respondent's premises.

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4. On November 5, 2004, an empty bottle of gin with an intact, undamaged, non-mutilated identification stamp affixed to it (Tax Stamp No. Y 04090253) was present on Respondent's premises.
5. On April 20, 2005, Staff sent a Notice of Hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records, informing Respondent of the date, time, and place of the hearing, the statutes and rules involved, and the legal authorities under which the hearing was to be held.
6. The Notice of Hearing also contained language in at least 12-point bold-face type stating that if Respondent failed to appear at the hearing, Staff's factual allegations would be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.
7. On June 9, 2005, a public hearing was held before Jerry Van Hamme, Administrative Law Judge (ALJ), at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Staff was represented by Timothy Griffith, attorney. Respondent did not appear and was not represented at the hearing. The record was closed on that date.

VII. CONCLUSIONS OF LAW

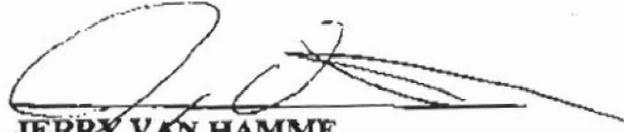
1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, §§ 6.01 and 11.61(b)(2).
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant 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 § 155.55, and 16 TEX. ADMIN. CODE § 37.3.
4. A default judgment should be entered against Respondent. 1 TEX. ADMIN. CODE § 155.55.
5. Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2); 28.09; and 28.11; and 16 TEX. ADMIN. CODE § 41.72.
6. Based on the foregoing Findings and Conclusions, Respondent's permits should be canceled.

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SIGNED August 4, 2005.



JERRY VAN HAMME

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS