

DOCKET NO. 575397

IN RE THE BANANA TREE	§	BEFORE THE
RESTAURANT AND CLUB	§	
PERMIT NOS. N-198974 & PE-198975	§	
	§	TEXAS ALCOHOLIC
	§	
GREGG COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-0733)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 8th day of March, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard Farrow. The hearing convened on June 24, 1999, and adjourned June 24, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 28, 1999. This Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. Exceptions to the Proposal for Decision were filed by the Respondent.

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.

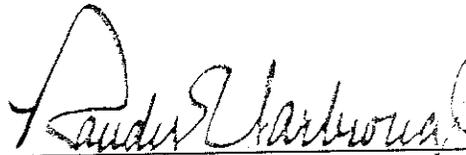
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-198974 & PE-198975 are herein **SUSPENDED** for a period of **sixty (60) days**, beginning at 12:01 a.m. on the 14th day of June, 2000, unless a civil penalty in the amount of **\$9,000.00** is paid on or before the 7th day of June, 2000.

This Order will become final and enforceable on March 29, 2000 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.

WITNESS MY HAND AND SEAL OF OFFICE on this the 8th day of March, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Richard Farrow
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (903) 534-7076

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Henry L. McGee, Jr.
ATTORNEY FOR RESPONDENT
401 Nichols Drive
Suwanee, GA. 30024
CERTIFIED MAIL/RRR NO. Z 473 040 470

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
✓ Longview District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 575397

REGISTER NUMBER:

NAME: The Banana Tree
Restaurant and Club

TRADENAME:

ADDRESS: 1000 W. Gentry Parkway, Tyler, Texas 75702

DATE DUE: June 7, 2000

PERMITS OR LICENSES: N-198974 & PE-198975

AMOUNT OF PENALTY: \$9,000.00

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 7th DAY OF June, 2000, 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.

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	OF
THE BANANA TREE RESTAURANT AND CLUB	§	
PERMIT NOS. N-198974 AND PE-198975	§	
GREGG COUNTY, TEXAS	§	
(TABC DOCKET NO. 575397)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Commission) brought this action against the Respondent permittee for refusing to allow inspection by an authorized representative of the Commission and for possession on the premises of empty bottles of distilled spirits which had not had the identification stamps invalidated. The facts were disputed. This proposal finds that inspection was not refused but that the Respondent did possess empty bottles of distilled spirits which had not had the identification stamps invalidated. This proposal recommends a 60 day suspension or a civil penalty of \$7,500.00 in lieu of suspension.

I. Procedural History, Jurisdiction and Notice

There were no objections or issues raised as to notice and jurisdiction; therefore those matters are referred to in the findings of fact and conclusions of law without further discussion here.

A hearing was held on June 24, 1999, at the State Office of Administrative Hearings in Tyler, Texas, before Richard Farrow, an Administrative Law Judge with the State Office of Administrative Hearings. Staff was represented by Dewey Brackin, attorney for the Texas Alcoholic Beverage Commission. Respondent was present and was represented by H. L. McGee, attorney. The testimony and other evidence was received and the record was closed on that same date.

II. Discussion of Evidence

On August 25, 1997, TABC enforcement Agent Tullos went to the Respondent's premises with an auditor from the Comptroller's office at the request of the auditor. While the auditor went about his audit, Agent Tullos conducted an inspection of the premises.

Tullos testified that he found several bottles on the premises that appeared to be fuller than they would be from the manufacturer or bottler indicating, in his opinion, that they had been refilled. Tullos also testified that in the office of the premises he found two Crown Royal bottles (1.0 liter) that were empty but that had in fact identification stamps along with another 1.7 liter bottle that was nearly empty and also had not had the tax stamp scratched or mutilated.

There was on the premises, but not attached to the premises, a barbeque shack that agent Tullos also inspected but found no bottles of alcoholic beverages or any other violation. Also on the property were several old vehicles including what was variously referred to as an old bus, van, refrigerator truck, truck bed, milk bus, warehouse, shed, and storage shed. This was apparently an old trailer that had been a refrigerated unit of a truck that was no longer part of a truck but the van, or trailer unit had been removed and was no longer mobile or refrigerated. The unit was self contained in that the door could be shut and there would be no open sides. Respondent testified that he had used it for a storage warehouse in the past. Herein it shall be referred to as a "van". Tullos testified that he looked inside the van and saw several whiskey bottles and after being told by the licensee that there was no key available to unlock the van to allow inspection, Tullos broke the lock and gained access. Inside, he found twelve 1.75 liter and four 1.0 liter whiskey bottles, all empty with valid, unmutated stamps.

Ernest Shelton, Jr., the auditor who had requested Tullos go with him to the premises, said he observed the bottles with the unmutated tax stamps. He also observed Tullos try to open the bus with Mr. Battee's keys but that none of them worked. Shelton testified that Battee had told Tullos several times that he had no key to the bus.

The Respondent, Jerome Battee, has been the President of the Banana Tree Restaurant and Club for the past eleven years. He testified that on this occasion there was only one empty Crown Royal bottle in his office that did not have a mutilated stamp. According to Battee, it was his custom and his direction to his employees that the empty bottles be brought to him so that he could scratch or mutilate the stamps. It was Battee's opinion that the bottle that was in his office when Tullos arrived must have been put there recently for his attention and he had not been back to his office since the bottle had been put there by an employee.

Respondent testified that he told Agent Tullos that he did not have a key to the barbeque shack because it had been rented to someone else but that he had or could send for someone who had a key. Someone ended up crawling through a window and unlocking the shack from inside in order to allow Agent Tullos access to the building.

Mr. Battee also testified that the van had been there for years, had never been inspected by Mr. Tullos in the past, and that he did not have a key to it as he had rented it to Leroy Cains for use in storing tack for Cains' horses. He said that he sent for the man who had the key when Agent Tullos insisted that he be allowed to inspect the inside of the van. Agent Tullos would not wait and broke into the van.

As to the bottles in the van, Battee said he had not been in the van in a long time but recalled that a former employee, Ann Smith, used to take some of the old bottles when they were to be discarded and kept them to make decorations of them and stored them in the back of the van. That would have been some time prior to August, 1997.

Ms. Virginia Ann Smith testified that she had been an employee at the Banana Tree waiting tables and bartending. She was no longer an employee but had left the Banana Tree in 1997 or 1998. While there she would collect empty bottles from behind the bar and put them in the van for later use in making decorative plant vases for resale. She testified that when she needed in the van she would have to get "Leroy" to let her in because he had the key. She admitted that when she left the Banana Tree she may have left some bottles in the van. Ms. Smith brought a decorative bottle/plant vase to the hearing to demonstrate the craft and it should be said that the vase was quite unique and attractive.

Mildred J. Battee works at the Banana Tree on weekends and was so employed in August 1997. She said that she was instructed to scratch the labels off the empties when they became empty and was not instructed to put any bottles aside and let Jerome Battee scratch the stamps and dispose of them at a later time.

The evidence presented described the premises in some detail. The property includes the Banana Tree Club building, a separate smaller building for a barbeque shack that is not connected to the main building, and behind a partial fence, some cars, various trash and the van or "bus" referred to herein. The property all belongs to Respondent and is contiguous.

The permit history was presented in documents admitted into evidence showing the permits issued and the violation history of the Respondent which included a prior violation for failure to mutilate local distributor identification stamps on empty bottles of distilled spirits.

III. Analysis

The first question that the parties and the evidence raised is whether the "van" is a part of the premises of the Permittee over which he may be liable under the Code. The Code defines premises as "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 §11.49. It would seem from the above definition that the barbeque shack and the van are part of the premises and therefore subject to inspection and compliance of the Code provisions and Rules of the Commission.

The next focus for consideration would be whether the bottles found in the van with un mutilated stamps constitute a violation of section 28.09 of the Code requiring the stamp to be mutilated at the time the bottle is emptied. The defense position that the defendant

did not put those bottles in the van but that an employee did so is no defense. An employee's actions are imputed to the license or permit holder under the Code. Mr. Battee's claimed lack of knowledge that the bottles had been put in the van, if taken as true, would not address the question of the unmutilated stamps. Even had someone put the bottles in the van without Mr. Battee's knowledge or permission, the stamps had not been mutilated as required. The fact that there were empty bottles to take without permission with stamps that had not been mutilated indicates a violation.

It was not disputed that the bottle or bottles found in the office of the premises had not had the stamps mutilated. The instruction Mr. Battee testified he had given his employees to deliver to him all empty bottles and he would mutilate the stamps was clearly contradicted by testimony of his employee. Mildred Battee said she was told to mutilate the stamp at the time the bottle was emptied. No other evidence was presented to substantiate Mr. Battee's testimony. Even taken as true, the violation occurred when the bottles were emptied and the stamp not immediately mutilated as required by §28.09(a) and (b). The bottles found in the office with unmutilated stamps are each a violation of the Code subject to penalty. TEX. ALCO. BEV. CODE ANN. §28.09(d).

As to whether Respondent refused to allow inspection of the premises, the fact that Respondent had rented the buildings on the premises and did not have immediate access to those buildings or vehicles does not necessarily constitute refusal. The fact that he admitted he did not have the keys but had offered to send for them does not lend itself to a finding of refusal. Apparently, Respondent helped facilitate Agent Tullos' entry to the barbeque shack. The witnesses testified that to get into the van they would have to go to Mr. Cains for the key. That Respondent **should** have keys to his rented property does not mean that his failure to have them is refusal to allow inspection.

IV. Findings of Fact

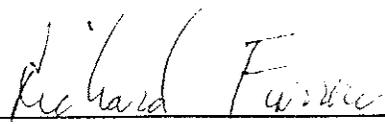
1. Respondent holds Private Club Registration Permit, N-198974 and Beverage Cartage Permit, PE-198975, and held such on August 25, 1997.
2. Notice of hearing was sent to attorney for Respondent and no objection was made as to such notice.
3. On August 25, 1997, two empty bottles of distilled spirits were kept in the Respondent's office with the identification stamps on such bottles intact and not mutilated.
4. On August 25, 1997, sixteen empty bottles of distilled spirits with unmutilated identification stamps were kept in a van or bus located on and a part of the Respondent's premises.
5. The van located behind the main building of the premises was used at times as a storage area for Respondent's business and was at all times under the control of the Respondent.

6. Respondent did not have the keys to the barbeque shack or the van located on the premises at the time inspection was requested.
7. Although Respondent did not have the keys, he did offer to send for the keys or send for the renters who had the keys to the building and van on the premises.
8. Respondent helped TABC agent Tullos to gain access to the barbeque shack in order to inspect the premises, although he did not have the keys.
9. Prior to August 25, 1997, Respondent has had at least one prior adjudicated violation for failure to mutilate local distributor identification stamps on empty bottles of distilled spirits.

V. Conclusions of Law

1. Service of proper and timely notice of the hearing was effected on the Respondent pursuant to TEX. GOVT. CODE ANN. Chapter 2001.
2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX ALCO. BEV. CODE ANN. §§28.09, 32.17, and 61.74.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN. Chapter 2003.
4. Based on findings 4-8, Respondent did not refuse inspection of the premises by an authorized representative of the Texas Alcoholic Beverage Commission.
5. Based on findings 3 and 4, Respondent did possess eighteen (18) empty bottles of distilled spirits that had not had the local distributor identification stamp mutilated in violation of TEX. ALCO. BEV. CODE ANN. §28.09 and of TAC §41.72
6. Based on Conclusion 5 and Finding 9, suspension of Respondent's license for a period of 60 days or a payment of a civil penalty in lieu of suspension in the amount of \$7,500.00 is warranted.

Signed this 28th day of December, 1999.



Richard Farrow
Administrative Law Judge

SOAH DOCKET NO. 458-99-0733

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
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V. §
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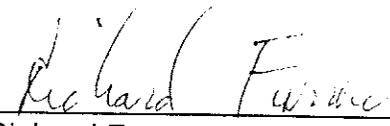
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V. Conclusions of Law

1. Service of proper and timely notice of the hearing was effected on the Respondent pursuant to TEX. GOVT. CODE ANN. Chapter 2001.
2. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX ALCO. BEV. CODE ANN. §§28.09, 32.17, and 61.74.
3. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN. Chapter 2003.
4. Based on findings 4-8, Respondent did not refuse inspection of the premises by an authorized representative of the Texas Alcoholic Beverage Commission.
5. Based on findings 3 and 4, Respondent did possess eighteen (18) empty bottles of distilled spirits that had not had the local distributor identification stamp mutilated in violation of TEX. ALCO. BEV. CODE ANN. §28.09 and of TAC §41.72
6. Based on Conclusion 5 and Finding 9, suspension of Respondent's license for a period of 60 days or a payment of a civil penalty in lieu of suspension in the amount of \$7,500.00 is warranted.

Signed this 28th day of December, 1999.



Richard Farrow
Administrative Law Judge