

DOCKET NO. 458-98-2322

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
vs.	§	OF
	§	
ROBERT SEAN DEERING d/b/a NORTH ST. MARY'S BREWING COMPANY PERMIT NOS. BG-304358, BL-304359 BEXAR COUNTY, TEXAS	§ § § § § § § §	ADMINISTRATIVE HEARINGS
(TABC CASE NO. 577845)	§	(SAN ANTONIO, TEXAS)

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this action seeking suspension of Permit Nos. MB-304358 and BL-304359 issued to Robert Sean Deering d/b/a North St. Mary's Brewing Company. North St. Mary's Brewing Company does business in Bexar County as a bar. The Staff alleged that North St. Mary's Brewing Company violated §§ 25.04. 61.71(a)(1) and 101.62 of the Texas Alcoholic Beverage Code on or about October 23, 1997. After carefully considering the evidence and arguments of counsel, the Administrative Law Judge (ALJ) finds that North St. Mary's Brewing Company violated §§ 25.04. 61.71(a)(1) and 101.62 of the Texas Alcoholic Beverage Code.(Code)

JURISDICTION AND NOTICE

The Commission has jurisdiction over this proceeding pursuant to §§ 6.01, 11.61, 67.71, and 32.01 of the Code, TEX. GOVT. CODE ANN. §2001, et seq., and 1 TAC §155.1, et seq.; The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOVT. CODE ANN. §2001, et seq, and the State Office of Administrative Hearings Rules, 1 TEX. ADMIN. CODE, §155, et seq. (West).

Notice of the hearing was mailed to North St. Mary's Brewing Company on January 14, 1999. The notice 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. GOVT. CODE ANN. §2001.052. There were no contested issues of notice or jurisdiction in this proceeding.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized to suspend for not more than 60 days or to cancel a permit or license, pursuant to §61.71(a)(1) of the Code, if the licensee or the permittee violates the Code. In this case a violation of Code provision §101.62 is alleged.

The Texas Alcoholic Beverage Code §101.62 states:

OFFENSIVE NOISE ON PREMISE. No licensee or permittee, on premises under his control, may maintain or permit a radio, television, amplifier, piano, phonograph, music machine, orchestra, band, singer, speaker, entertainer, or other device or person that produces, amplifies, or projects music or other sound that is loud, vociferous, vulgar, indecent, lewd, or otherwise offensive to persons on or near the licensed premises.

The standard of proof required to establish a violation is that required in a civil case: the preponderance of the evidence. The trier of fact must ask, if weighing all the evidence, the party with the burden of proof has shown by 51% of the evidence that the alleged violation occurred. Staff bears the burden of proof to show any alleged violations occurred.

When suspension of a permit or a license is authorized, the permittee must be given an opportunity to pay a civil penalty in lieu of suspending the permit. Section 11.64(c) allows for a deviation from the Code penalty guidelines if the circumstance justify the deviation.

PROCEDURAL HISTORY

The hearing was convened February 19, 1999, at the State Office of Administrative Hearings, 1015 Jackson Keller, Suite 102B, San Antonio, Texas. Administrative Law Judge Leah Bates presided. Andrew Del Queto, Assistant

Attorney General, represented the Commission's Staff with Mr. Bill Allen serving as party representative. Mr. Deering represented himself as permittee and owner of North St. Mary's Brewing Company. The parties presented the testimony of two witnesses. The hearing was adjourned on February 19, 1999.

DISCUSSION

A. Description of North St. Mary's Brewing Company

North St. Mary's Brewing Company is a night club located in San Antonio, Texas, and holds Permit Nos. BG-304358 and BL-304359 issued by the Commission.

B. Summary of Allegations

The Staff alleged that on or about October 23, 1997, North St. Mary's Brewing Company maintained or permitted a music machine, bands, speakers and/or entertainers that produced, amplified, and/or projected music or other sounds that were loud and/or offensive on or near the licensed premise, in violation of Code §25.04. 61.71(a)(1) and 101.62 of the Texas Alcoholic Beverage Code.

C. Alleged Violation

The Staff alleged the violations occurred, on the premises of North St. Mary's Brewing Company. The Staff presented Kevin Cook, a City of San Antonio Noise Abatement Officer. Mr. Cook testified that on October 23, 1997, he issued a citation to Robert S. Deering, for a violation of the San Antonio City Code Article III-Noise. (Ord. No. 75012, section 21-52, 1-9-92) Mr. Cook testified that on that evening he received a meter reading of 76 decibels, and the maximum allowable nighttime level is 63 decibels. Mr. Cook testified that he took three separate readings, and that 76 decibels was the lowest reading.

The North St. Mary's Brewing Company presented evidence the City of San Antonio's noise meters were not properly calibrated, nor sufficiently reliable. On cross-examination, Mr. Cook testified that this particular meter was not calibrated, and that since this violation the City of San Antonio had purchased more expensive, sophisticated meters. Mr. Deering also possessed a noise meter similar to

the City of San Antonio's instrument. Mr. Deering testified that on the evening in question he received a reading much lower than the reading by Mr. Cook. Mr. Deering has presented some evidence that his instrument was also not properly calibrated.

D. Penalty

In determining the recommended penalty for the violation, the ALJ has considered the standard penalty guidelines set out in the Commission's Rule, 16 TAC §37.60. The staff presented evidence of one previous violation, which was not controverted by the North St. Mary's Brewing Company. However, the evidence of the lack of a calibration of the meter and Mr. Deering's lack of knowledge of the violation warrants a departure from the guidelines.

FINDINGS OF FACT

1. The requests for hearing in this case, with the complaint attached, was properly and timely filed with the State Office of Administrative Hearings on May 7, 1998.
2. Notice of the hearing was mailed to North St. Mary's Brewing Company, Inc. d/b/a North St. Mary's Brewing Company at its last known address, on January 14, 1999.
3. 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.
4. The hearing was convened February 19, 1999, at the Offices of the State Office of Administrative Hearings, San Antonio, Texas. Administrative Law Judge, Leah Davis Bates, presided. Andrew del Cueto, Assistant Attorney General, with Bill Allen, representing the Commission staff. Mr. Deering represented himself, as owner of North St. Mary's Brewing Company. The hearing was adjourned February 19, 1999.
5. The Staff presented evidence of the noise ordinance violation. A citation was issued to Mr. Deering, on October 23, 1997 for violating the city's noise ordinance.

6. On October 23, 1997 a live band was playing inside North St. Mary's Brewing Company.

7. The City of San Antonio noise ordinance enumerates certain acts and declares them to be "noise nuisance" prohibitions. The ordinance prohibits the playing or permitting or causing the playing of any radio, television, phonograph, drum, juke box, nickelodeon, musical instrument, sound amplifier, or similar device which produces, reproduces or amplifies sound. The ordinance also includes acceptable day, as well as, nighttime levels.

8. On or about October 23, 1997, Mr. Deering, Respondent, maintained or permitted a music machine, a band, speakers and/or entertainer that produced, amplified, and/or projected music or other sounds that were loud and offensive to persons on or near the licensed premise, in violation of §§25.04, 67.71(a)(1) and 101.62 of the Texas Alcoholic Beverage Code.

9. The City of San Antonio had an instrument that was not calibrated.

10. Mr. Deering had an instrument that was not properly calibrated.

CONCLUSIONS OF LAW

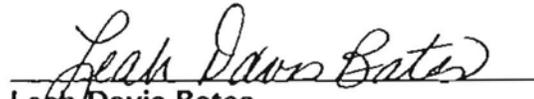
1. Proper and timely notice was given by Texas Alcoholic Beverage commission (Staff) to all parties legally entitled to notice in accordance with the Texas Administrative Procedures Act, TEX. GOV'T CODE ANN. § 2001.054 (V.T.C.A. 1994) ("APA").

2. Jurisdiction and procedure for this hearing were done in accordance with Subchapter B, Chapter 5 of the Texas Alcoholic Beverage Code, TEX. ALCO. BEV. CODE ANN. §1.01 (V.T.C.A.), and the State Office of Administrative Hearings Rules, 1TEX. ADMIN. CODE, §155 (West 1997).

3. Based upon the above Finding of Facts and Conclusions of Law, the Court finds that Respondent, Mr. Robert Deering, d/b/a, North St. Mary's Brewing Company permit and license should be suspended for 5 days for the violation set forth in Conclusion of Law number 3.

4. Pursuant to Code § 11.64(b),(c)(4) North St. Mary's Brewing Company should have the opportunity to pay a civil penalty of \$75.00 per day of suspension or \$375.00 in lieu of suspension, as set forth in Conclusion of Law number 4.

Signed this 29th day of March, 1999.

A handwritten signature in cursive script, reading "Leah Davis Bates", is written over a horizontal line.

Leah Davis Bates

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS