

DOCKET NO. 580722

IN RE DIAMONDS IN THE ROUGH	§	BEFORE THE
D/B/A DIAMONDS IN THE ROUGH	§	
PERMIT NOS. N-421400, PE421401	§	
	§	TEXAS ALCOHOLIC
	§	
STEPHENS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-2636)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of April, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya A. Cooper. The hearing convened on February 22, 2000 and adjourned February 22, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 14, 2000. 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. 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.

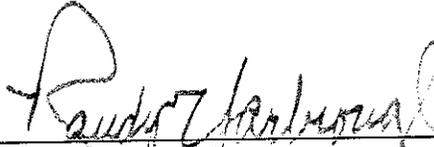
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. N-421400 and PE-421401 are herein **SUSPENDED for a period of five (5) days unless a civil penalty in the amount of \$375.00 is paid in lieu of the suspension.**

This Order will become final and enforceable on May 3, 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 12th day of April, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 626-7448

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

Diamonds in the Rough
RESPONDENT
3319 W. Walker
Breckenridge, Texas 76424
VIA CERTIFIED MAIL/RRR NO. Z 473 037 797

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Abilene District Office



**INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION**

April 10, 2000

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-2636
TABC Case No. 580722
Diamond's In the Rough
Private Club Registration Permit (N-421400) & Beverage Cartage
Permit (PE-421401)
Stephens County, Texas

I have read the attached record of the above referenced case and find the following:

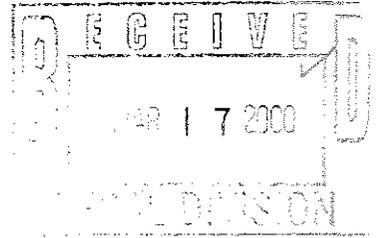
Based on the record, I concur with the finding of the Administrative Law Judge that the license at the above referenced location should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposal for Decision, suspending the License for a period of ~~SEVEN~~ **(5) days** unless a civil penalty in the amount of \$375.00 is paid in lieu of the suspension. *five*

Please make a copy of this decision and submit it along with the order to the respective parties.

Handwritten signature of Randy Yarbrough, written in cursive and underlined.

RY

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

March 14, 2000

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

VIA CERTIFIED MAIL Z 283 051 923
RETURN RECEIPT REQUESTED

RE: Docket No. 458-99-2636; Texas Alcoholic Beverage Commission vs. Diamonds in the Rough d/b/a Diamonds in the Rough, TABC Case No. 580722

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Christopher Burnett, attorney for Texas Alcoholic Beverage Commission, and to Diamonds in the Rough d/b/a Diamonds in the Rough, Respondent. For reasons discussed in the proposal, I recommend that Respondent's Private Club Registration Permit N-421400 and Beverage Cartage Permit PE-421401 should be suspended for five (5) days; however I recommend that Respondent should be permitted to pay a civil penalty of Three Hundred Seventy Five Dollars (\$375.00) in lieu of the suspension of its permits.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Tanya A. Cooper".

Tanya A. Cooper
Administrative Law Judge

TC:ds

Enclosure

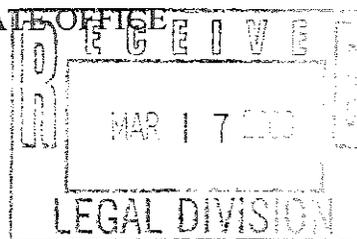
xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing - **Regular Mail**; Christopher Burnett, Staff Attorney, Texas Alcoholic Beverage Commission - **CMRR# Z 282 051 924**; Diamonds in the Rough, Respondent, 3319 W. Walker, Breckenridge, Texas 76424; **CMRR # Z 283 051 925**

The Vinnedge Building
2100 N. Main Street, Suite 10 ♦ Fort Worth, Texas 76106
(817) 626-0003 Fax (817) 626-7448

TEXAS ALCOHOLIC BEVERAGE §
COMMISSION §
V. §
DIAMONDS IN THE ROUGH, D/B/A §
DIAMONDS IN THE ROUGH §
PERMIT NOS. N-421400 & PE-421401; §
STEPHENS COUNTY, TEXAS §
(TABC CASE NO. 580722) §

BEFORE THE STATE OFFICE

OF



ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Diamonds In The Rough, d/b/a Diamonds In The Rough (Respondent), alleging that Respondent's employee sold an alcoholic beverage to a nonmember on the licensed premises constituting operation of an open saloon, in violation of the Texas Alcoholic Beverage Code (Code). Staff requested that Respondent's permits be suspended for a period of 10 days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$1,500.00. This proposal finds that Respondent's employee did sell an alcoholic beverage to a nonmember on the licensed premises; however, the Administrative Law Judge (ALJ) recommends suspension of Respondent's permits for a period of 5 days. The ALJ further recommends that Respondent be given an opportunity to pay a civil penalty in lieu of suspension in the amount of \$375.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §§6.01, 11.61 and 32.01(Vernon 2000). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. §2003.021(Vernon 2000). There were no contested issues of notice or jurisdiction in this proceeding.

On February 22, 2000, a hearing convened before Tanya Cooper, ALJ, of the State Office of Administrative Hearings, at 2100 North Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Staff was represented at the hearing by Christopher Burnett, TABC Staff Attorney. Respondent appeared and was represented by Richard Smock, its agent and the premises' manager.

At the hearing, Agent M. Horton, Agent H. Salmon, and Richard Smock testified. Exhibits were received into evidence from both parties on that date and the record was closed.

LEGAL STANDARDS AND APPLICABLE LAW

TABC is authorized under §11.61 of the Code to cancel or suspend for not more than 60 days, a private club registration permit if it is found that the permittee club has sold alcoholic beverage so as to constitute an open saloon pursuant to §32.17(a)(1) of the Code. An open saloon is defined in §32.17(b) of the Code as any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink, or sold or offered for sale for on-premises consumption.

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. The amount may not be less than \$150 or more than \$25,000 for each day the permit was to have been suspended. If the penalty is not paid before the sixth day after the permittee is notified of the amount, the permittee loses the opportunity to pay it, and the permit's suspension shall be imposed. In determining the amount of the penalty, Texas Alcoholic Beverage Commission is directed to consider the economic impact a suspension would have on the permittee. [See Code §11.64(a)].

The Commission may additionally relax any provision of the Code relating to the suspension or cancellation of the permit or license and assess a sanction the Commission finds just under the circumstances. The Commission may also reinstate the license or permit at any time during a suspension period on payment by permittee or licensee of a fee of not less than \$75 nor more than \$500, if the Commission finds that any of the following circumstances existed:

1. that the violation could not reasonably have been prevented by the permittee or licensee by the exercise of due diligence;
2. that the permittee or licensee was entrapped;
3. that an agent, servant, or employee of the permittee or licensee violated this code without the knowledge of the permittee or licensee;
4. that the permittee or licensee did not knowingly violate this code; or
5. that the violation was a technical one. [See Code §11.64(b) and (c)].

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Private Club Registration Permit N-421400 and Beverage Cartage Permit PE-421401 issued to Diamonds In The Rough, 3319 West Walker, Breckenridge, Stephens County, Texas. The licensing history maintained by Staff in relation to these permits reflects one prior disciplinary action, based upon an agreement and waiver of hearing that resulted in permit suspensions or payment of a fine in lieu of suspensions, for serving alcoholic beverage during prohibited hours.

On August 29, 1998, at approximately 8:45 p.m., Agent M. Horton, Texas Alcoholic Beverage Commission, entered Respondent's premises working in an undercover capacity. Agent Horton stated that his overall purpose on that evening was to determine whether any private club

operators in the area would sell alcoholic beverages to a person without that person being a member of the club.

Agent Horton testified that he paid a \$5.00 cover charge at the licensed premises' door, but did not sign on the sign-in sheet posted at the entrance of the club. The sign-in sheet, as by Respondent's policy, was to be signed only by club members, or family members or guests of club members.

Respondent's employee working the club's door had determined that Agent Horton was not a member of the club, a family member of a member, or a guest of a club member. Agent Horton was directed by this employee to the bar area, and instructed to purchase a membership from the bartender. Agent Horton went to the bar as directed. However, when he was approached by the bartender, Terryl Rene Hill, Agent Horton ordered an alcoholic beverage, a "Coors Light", without discussing with Ms. Hill his need to purchase a membership contrary to the directions he had been provided with by Respondent's other employee before entering the premises.

Respondent's employee, Ms. Hill, served Agent Horton the beer he ordered without checking for any type of membership from him. Agent Horton stated he drank some of the beer, and then left the club to report these events to Agent H. Salmon, who was waiting outside the premises.

Agent Salmon, after receiving Agent Horton's report, entered the premises. He then contacted Ms. Hill and Richard Smock, Respondent's agent, regarding this incident. Agent Horton was not a member of this private club at the time he was served alcoholic beverage or a person otherwise lawfully able to purchase alcoholic beverages at the club, and notice of this violation was provided to Mr. Smock and Ms. Hill.

Mr. Smock testified at the hearing. He discussed the club's operation as an exclusive restaurant and bar, including enforcement of a dress code, prohibition of any type of disorderly conduct such fighting or gambling, and described the strict procedures he required for his employees in checking patrons for memberships and meeting age requirements before admission into the premises. He presented a written list of instructions provided to Respondent's employees regarding the club's door policy.

Mr. Smock acknowledged that the sale to a nonmember had occurred on a busy Saturday night. A band was scheduled to appear increasing the door traffic and making it impractical, in Mr. Smock's opinion, to process club memberships at the premises door. As a result, all non-members were being referred to the bartenders to purchase either temporary or full club memberships. He contended, however, that this violation would not have occurred but for Agent Horton disobeying the proper instructions he was given by Respondent's employee at the door who had determined that Agent Horton was neither a member of the club, a family member of a club member, nor a guest of a member.

ANALYSIS

TABC's evidence shows that Agent Horton was sold alcoholic beverage, beer, for consumption on the licensed premises, Diamonds in the Rough, on August 29, 1998. This sale of alcoholic beverage was made by Terryl Rene Hill, an employee of Respondent. At the time this sale was made, Ms. Hill did not check for any type of identification from Agent Horton.

Ms. Hill's failure to request identification was reasonable given that identification was being checked at the door of the premises by another of Respondent's employees. Non-members were being referred to the bar to obtain either a temporary membership or full membership in the private club. Agent Horton was not a member of Diamonds in the Rough, a guest of any club member, or a family member of a club member at the time the alcoholic beverage was provided to him. However, when asked by Ms. Hill how she could help him, rather than truthfully indicate to her that he needed to purchase a membership, he responded by ordering an alcoholic beverage as if he were a member of the club which he knew he was not at the time. Agent Horton's actions were misleading to Respondent's employee, Ms. Hill.

The events of that evening illustrate that a flaw existed in Respondent's method of ensuring that only club members or other persons lawfully permitted to be served alcoholic beverage on the premises were served. Unfortunately, it is foreseeable that individuals may engage in deceit or deception in order to avoid paying a separate club membership fee and then unlawfully purchase alcoholic beverages within a private club; however, the ALJ deems Mr. Smock's testimony credible that Respondent's employees are instructed to verify the identity of its patrons. It is clear from the evidence that Respondent's employees were exercising due diligence in following these instructions on August 29, 1998; and that but for, Agent Horton's failure to comply with the appropriate directions he was given when he was conditionally allowed into the premises, this particular sale would not have occurred.

Staff requested a 10-day suspension of Respondent's permits for this violation. Petitioner's rules establish a range of enforcement actions. See 16 TEX. ADMIN. CODE §37.60. Petitioner has also asked that Respondent be allowed to pay the minimum civil penalty in lieu of suspension of \$150 per day of suspension as provided in Code §11.64. A first violation of operating an establishment as an illegal open saloon has a recommended sanction of a 5-day permit suspension, and ranges up to a maximum penalty, upon a third violation, of permit cancellation

In arriving at the recommendation below, the ALJ considered a number of factors. Respondent's history, as maintained by the TABC, shows no pattern of operating this premises as an open saloon. Although other violations are reflected on Respondent's licensing history, only one violation, in which the right to a hearing was waived by Respondent, has resulted in a prior suspension of Respondent's permits. Respondent's evidence of mitigating circumstances was persuasive. Respondent was exercising due diligence to prevent violations such as this one, but fell short in preventing the violation by failing to recognize that some individuals may employ numerous tactics, including deceit, to avoid payment of private club memberships fees. Agent Horton's

conduct, contrary to the appropriate directions he had been provided by Respondent's employee, mislead another of Respondent's employees, and his conduct greatly contributed to the Code violation. This violation by Respondent's employee occurred without Respondent's knowledge.

RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for 5 days. The ALJ further recommends that Respondent be given an opportunity to pay a civil penalty in the amount of \$375 (5 days x \$75 per day) in lieu of suspension before the sixth day after the TABC notifies Respondent of its order. See TEX. ALCO. BEV. CODE ANN. §11.64(b) and (c)(Vernon 2000).

Any other requests for entry of specific findings of fact and conclusions of law, and any other requests for general or specific relief, if not expressly set forth below, are denied.

FINDINGS OF FACT

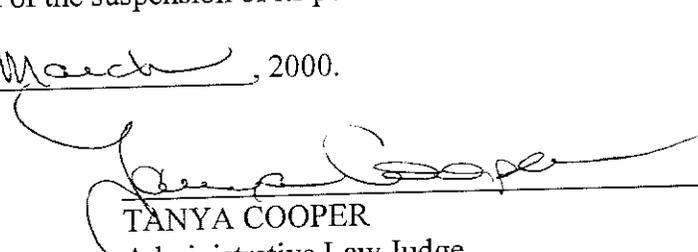
1. Diamonds In The Rough (Respondent) holds Private Club Registration Permit N-421400 and a Beverage Cartage Permit PE-421401.
2. On December 10, 1999, Staff of the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing through its agent and representative, Richard Smock.
3. On August 29, 1998, Respondent's employee, Terryl Rene Hill, was working at Diamonds In The Rough located at 3319 West Walker, Breckenridge, Stephens County, Texas.
4. On that date, Ms. Hill sold and served Agent M. Horton, Texas Alcoholic Beverage Commission, alcoholic beverage, a Coors Light beer.
5. Working in an undercover capacity at the time, Agent Horton was not a member, nor a guest of any member, nor or a family member of any member of Diamond's In The Rough.
6. Ms. Hill, working as a bartender for Respondent, did not ask for any proof of club membership from Agent Horton before selling and serving him alcoholic beverage because membership was being verified at the premises' door, and those who were non-members and others not otherwise allowed to purchase alcoholic beverages, were instructed to obtain a temporary or full membership at the bar before purchasing alcoholic beverage.
7. Respondent's violation history, as maintained by the TABC, does not show previous open saloon violations.

8. Respondent, through its agents and employees, was exercising due diligence to avoid this type of violation by checking patrons for membership status at the door of the premises, and by referring non-members to purchase appropriate memberships at a designated area.
9. Respondent did not knowingly violate the Code; the violation by Respondent's employee occurred without the Respondent's knowledge; and the violation occurred, in part, because of the misleading conduct of TABC's agent.

CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §§6.01 and 32.01(Vernon 2000).
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating 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. Ch. 2003(Vernon 2000).
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3, 4, 5, and 6, Respondent's agent sold alcoholic beverage to a nonmember on the licensed premises, constituting operation of an open saloon contrary to TEX. ALCO. BEV. CODE ANN §32.17(Vernon 2000).
5. Based on Findings of Fact Nos. 3 - 6 and Conclusion of Law No. 4, Respondent's Private Club Registration Permit N-421400 and Beverage Cartage Permit PE-421401 should be suspended for 5 days.
6. Based on Finding of Facts 7, 8, and 9 and Conclusion of Law No. 5 and TEX. ALCO. BEV. CODE ANN. §11.64(b) and (c)(Vernon 2000), Respondent should be permitted to pay a civil penalty of \$375 in lieu of the suspension of its permits.

SIGNED this 14th day of March, 2000.


TANYA COOPER
Administrative Law Judge
State Office of Administrative Hearings