

DOCKET NO. 595738

IN RE SHELLEY LEA JOYNER
D/B/A SWAN CLUB
PERMIT NO. BG471043

TARRANT COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-0355)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 4th day of March 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened on December 14, 2001. The record closed on December 28, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 8, 2002. 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 were filed on December 28, 2001.

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 No. BG471043 is hereby **SUSPENDED for fifteen (15) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$2,250.00** on or before the **8th day of May 2002**, all rights and privileges under the above described permit will be **SUSPENDED for a period of fifteen (15) days, beginning at 12:01 A.M. on the 15th day of May 2002**.

This Order will become final and enforceable on March 25, 2002, 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 4th day of March 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Shelley Lea Joyner
d/b/a Swan Club
RESPONDENT
2713 NE 28th St.
Fort Worth, Texas 76111-2923
CERTIFIED MAIL NO. 7001 2510 0000 7279 0605

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Fort Worth District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 595738

REGISTER NUMBER:

NAME: SHELLEY LEA JOYNER

TRADENAME: SWAN CLUB

ADDRESS: 2713 NE 28th St., Fort Worth, Texas 76111-2923

DATE DUE: May 8, 2002

PERMITS OR LICENSES: BG471043

AMOUNT OF PENALTY: \$2,250.00

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 8TH DAY OF MAY 2002, 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.

DOCKET NO. 458-02-0355

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

SHELLY LEA JOYNER
D/B/A SWAN CLUB
TARRANT COUNTY, TEXAS
(TABC CASE NO. 595738)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this action to cancel the permit of Shelly Lea Joyner d/b/a Swan Club (Respondent). The Administrative Law Judge (ALJ) recommends Respondent's permit should be suspended for 15 days, or as an alternative that Respondent pay a penalty of \$2,250.

I. PROCEDURAL HISTORY & JURISDICTION

On August 28, 2001, Staff sent Respondent a complaint alleging that Respondent permitted the use or display of her permit in the conduct of a business for the benefit of a person not authorized by law to have an interest in the license. This matter was referred to the State Office of Administrative Hearings (SOAH). On December 14, 2001, a hearing convened before ALJ Robert F. Jones Jr., at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy E. Griffith, an attorney with the TABC Legal Division. Respondent appeared personally. The record closed on December 28, 2001. Because notice and jurisdiction were not contested issues, those matters are addressed only in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

A. Applicable Law

- A wine and beer retailer's permit may be suspended or canceled if the permittee allows the use or display of the permit in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit. TEX. ALCO. BEV. CODE ANN. (Vernon 2002) (the Code) §§ 25.04(b), 61.71(a)(15).
- A wine and beer retailer's permit may be suspended or canceled if the permittee violates the Code. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee is unlawful. §§ 61.71(a)(1), 109.53 of the Code.

- Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. § 109.53 of the Code.¹
- A wine and beer retailer's permit may be suspended or canceled if the permittee makes a false statement or a misrepresentation in an original or a renewal application. §§ 25.04(b), 61.71(a)(4) of the Code.

B. Evidence

Respondent's licensed premises are located at 2713 Northeast 28th Street, Fort Worth, Tarrant County, Texas. Respondent holds wine and beer retailer's permit BG471043. Respondent's permit was originally issued on April 26, 2000. Respondent's original application for the permit is dated March 16, 2000. Respondent listed only herself as investing in the business. She marked as "N/A" (not applicable) the name of any person that "have or will advance any money, . . . , or that have co-signed, guaranteed or financially assisted this business." (TABC Exhibit 2, Original Application, ¶ 10J.) Respondent's renewal application for the permit incorporated all of the "facts and representations made" in her original application, and Respondent swore that they "were and are true and correct." (TABC Exhibit 2, Renewal Application, page 2.)

TABC Agent Nathan Curry was assigned to make a "subterfuge" investigation of Respondent. In the course of his investigation, Agent Curry interviewed Respondent and Cary L. Leiby. He also obtained documents from Respondent. Based upon his investigation he concluded that sometime in March 2000, the electric, water and telephone accounts for the licensed premises had been placed in Cary L. Leiby's name rather than in Respondent's. Mr. Leiby is Respondent's friend. The water and electric bills for the licensed premises for May and June 2001, were admitted into evidence. (TABC Exhibit 4.) All four bills were directed to Cary L. Leiby, at the licensed premises.

Respondent asserted that Mr. Lieby was never in control of the premises, that her permit was not used for Mr. Lieby's benefit, and that she entered into no plan with Mr. Lieby for the purpose of violating the law. She argued that neither her original nor renewal application mentioned or questioned in whose name the utilities' accounts for the premises were to be placed.

C. Analysis, Conclusion, and Recommendation

The Staff has proved a violation of § 109.53 of the Code. As Agent Curry explained, Mr.

¹ It is the intent of the legislature 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*. *Id.* (emphasis supplied).

Leiby had "control" of the premises to the extent that he had the ability to cancel the electric and water accounts for the licensed premises. Without power or water, the premises would be forced to close, even if only temporarily. Respondent did not exercise "exclusive . . . control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises." § 109.53 of the Code.

The Staff proved that Respondent allowed "the use or display of the permit in the conduct of a business for the benefit of a person not authorized by law to have an interest in the permit." §§ 25.04(b), 61.71(a)(15) of the Code. Respondent used her permit for Mr. Lieby's benefit, to the extent that Respondent's business generated the income to pay the electric, water and telephone and relieved Mr. Lieby of his obligations on the accounts.

The Staff proved the existence of "a device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee." §§ 109.53, 61.71(a)(1) of the Code. As noted above, since Respondent did not exercise "exclusive control" over the premises, she "surrendered" control to Mr. Lieby. The plan was executed by Mr. Lieby placing the accounts on his credit, and Respondent paying the bills.

The Staff has also proved a violation of §§ 25.04(b), 61.71(a)(4) of the Code. Since Mr. Lieby essentially used his credit to establish the premises' electric, water and telephone accounts, he was a person who "financially assisted this business." (TABC Exhibit 2, Original Application, ¶ 10J.) By failing to note his involvement in her renewal application, Respondent misrepresented her status as a sole proprietor.

Section 109.53 of the Code was enacted in response to the fear of organized crime gaining control of the liquor industry in Texas, using "fronts." See also § 6.03 of the Code. The Legislature intended to prohibit "subterfuge ownership." It directed that the Code be "liberally construed to carry out this intent." It demands "strict adherence to the general policy of preventing subterfuge ownership." § 109.53 of the Code. As a consequence, the TABC's "standard penalty chart" calls for cancellation of a permit for violation of § 109.53. 16 TAC § 37.60. Since the application or renewal application is a primary source of assuring original compliance with the Code, as especially § 109.53, making a false statement or representation in an application also calls for cancellation. 16 TAC § 37.60.

The TABC may relax a provision of the Code "relating to the . . . cancellation of the permit" and assess a sanction that the TABC finds is "just under the circumstances." § 11.64(b) of the Code. The TABC has to find that the permittee did not "knowingly" violate the Code, or find that the violation was "technical." § 11.64(c)(4)&(5) of the Code. The arrangement between Respondent and Mr. Lieby, while in violation § 109.53, was not one originally intended to be prohibited by the Legislature. See §§ 6.03, 109.43 of the Code. Although Mr. Lieby could shut down the premises by closing the water and power accounts, he was not behind the scenes, taking the full benefit from the premises, or directing its operation. The violation was not "knowing" in the sense that Respondent and Mr. Lieby deliberately set out to violate the Code. The arrangement between Respondent and Mr. Lieby violated the strict meaning of § 109.53, and in that sense was "technical." The ALJ

recommends that the TABC relax the cancellation requirement 16 TAC § 37.60. § 11.64(b) of the Code.

Respondent's violation of § 61.71(a)(4) raises other issues. Mr. Lieby unquestionably "financially assisted [Respondent's] business." (TABC Exhibit 2, Original Application, ¶ 10J.) The original application was dated March 16, 2000. The evidence is that Mr. Lieby opened the accounts sometime in March, although there is no evidence if it was before or after March 16. The evidence does not disclose that Respondent made "a false statement or a misrepresentation" in her original application. The statement became false after the application was filed. Respondent's renewal application did not correct the original application and disclose the arrangement with Mr. Lieby. Respondent's statement that all of the "facts and representations made" in her original application "were and are true and correct" was false when it was made. (TABC Exhibit 2, Renewal Application, page 2.) Respondent's actions were knowing, in that she was responsible for disclosing the truth in her renewal application. The violation arose because of a change in circumstance. The renewal application in effect incorporated the original application's "facts and representations." The "facts and representations" were correct on March 16, 2000, but subsequently became false. The violation is "technical," but significant. A lawyer or other sophisticated person encountering the "facts and representations made" in the original application "were **and are** true and correct" language would review the original application to make certain they were still true and correct. A less sophisticated person might not. The ALJ recommends that the TABC relax the cancellation requirement 16 TAC § 37.60. § 11.64(b) of the Code.

Respondent's permit may be suspended for 60 days. §§ 61.71(a)(1)(4) & (15) of the Code. Although the TABC is normally required to give the permittee an opportunity to pay a civil penalty instead of suspending a permit, the TABC has adopted rules to determine when a suspension may be imposed without affording the permittee that grace. § 11.64(a) of the Code; 16 TAC § 37.61. The TABC must determine what type of permit is in question and whether the sale of alcoholic beverages "constitutes the primary or partial source" of the permittee's business. *Id.* § 37.61(b)(1). The type of violation must be considered, *Id.* § 37.61(b)(2), and the permittee's past record. *Id.* § 37.61(b)(3). The TABC must also consider "aggravating or ameliorating circumstances" such as whether the permittee acted intentionally or recklessly, the "number, kind and frequency" of the permittee's violations, whether any person was killed or injured as a result of the violation, and whether the "character and nature" of the permittee's operation "are reasonably calculated to avoid violations." *Id.* § 37.61(c).

The Respondent should be allowed to pay a civil penalty in lieu of suspension. Respondent holds wine and beers retailer's permit BG471043, and the sale of alcoholic beverages "constitutes the primary or partial source" of the permittee's business. Respondent committed two major regulatory violations, as defined by the regulations. *Id.* § 37.60 (Standard penalty chart). Respondent's past record discloses a pending citation for "public intoxication," but nothing else. (*See* TABC Exhibit #2.) The case is aggravated by Respondent's intentional subterfuge arrangement with Mr. Lieby, and her reckless or at least negligent misrepresentations. The case is ameliorated because Respondent committed one wrong act, no person was harmed, and the wrong can be remedied.

The standard penalty chart does not prescribe a suspension period for these two violations.² The suspensions for "major regulatory violations" range from three to 20 days for a first offense. 16 TAC § 37.60 (Standard penalty chart). The statute proscribes up to a 60-day suspension. § 61.71(a) of the Code. The record in the case is "the determining factor as to the sufficiency of the penalty assessed." 16 TAC § 37.60 (g). Considering the above the ALJ recommends that Respondent's permit be suspended for 15 days, or as an alternative that Respondent pay a penalty of \$2,250.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued wine and beers retailer's permit BG471043 to Shelly Lea Joyner d/b/a Swan Club (Respondent).
2. Respondent's licensed premises are located at 2713 Northeast 28th Street, Fort Worth, Tarrant County, Texas.
3. Respondent's permit was originally issued on April 26, 2000.
4. Respondent's original application for the permit is dated March 16, 2000.
5. The original application listed only Respondent as investing in the business.
6. Respondent marked as "N/A" (not applicable) the name of any person that "have or will advance any money, . . . , or that have co-signed, guaranteed or financially assisted this business."
7. Respondent's renewal application for the permit incorporated all of the "facts and representations made" in her original application, and Respondent swore that they "were and are true and correct."
8. Sometime in March 2000, Respondent and Cary L. Leiby agreed that the electric, water and telephone accounts for the licensed premises would be in Cary L. Leiby's name.
9. The bills for the accounts were in Cary L. Leiby's name and mailed to the licensed premises.
10. Respondent paid the bill using funds generated from the operation of the licensed premises.
11. On October 16, 2001, the Staff served its Notice of Hearing (the NOH) on Respondent by certified mail.

² In SOAH Docket No. 458-97-1360, *Texas Alcoholic Beverage Commission v. Cy Harris Green d/b/a 510 Bar #2* (TABC Case No. 572545), a suspension of 10 days was imposed, in part, for a violation of §109.53 of the Code. The *Harris* case also involved an allegation of intoxication on the premises. Both allegations were stipulated by the permittee.

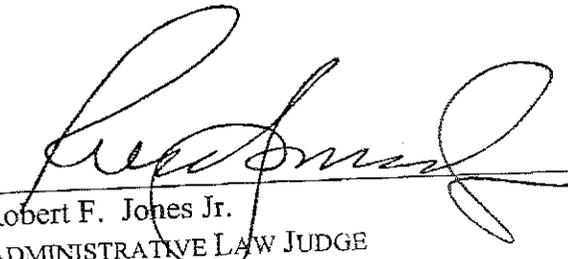
12. The NOH alleged Respondent had violated the Texas Alcoholic Beverage Code (the Code) in several specified instances. It informed the Respondent the hearing would be held on December 14, 2001, at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
13. On December 14, 2001, a hearing convened before Administrative Law Judge Robert F. Jones Jr., State Office of Administrative Hearings (SOAH). TABC was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared personally. Evidence was received, and the record was closed on December 28, 2001.

IV. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon 2002).
2. The State Office of Administrative Hearings 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. GOV'T CODE ANN. ch. 2003 (Vernon 2002).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2002).
4. Based on the foregoing findings, Respondent violated § 109.53 of the Code.
5. Based on the foregoing findings, Respondent violated §§ 25.04(b) and 61.71(a)(15) of the Code.
6. Based on the foregoing findings, Respondent violated §§ 61.71(a)(1) and 109.53 of the Code.
7. Based on the foregoing findings, Respondent violated §§ 25.04(b) and 61.71(a)(4) of the Code.
8. Based on the foregoing findings, Respondent's violations as determined in Conclusions 4 - 6 were not knowing and were a technical violation of the Code.
9. Based on the foregoing findings, Respondent's violation as determined in Conclusion 7 was a technical violation of the Code.

10. Based on the foregoing findings and conclusions, the ALJ recommends Respondent's permits be suspended for 15 days, or as an alternative that Respondent pay a penalty of \$2,250. §11.64(a), (b) of the Code.

SIGNED February 8, 2002.



Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS