

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Respondent holds Permit BG-485216 for its location at 13812 Research Boulevard, Austin, Williamson County, Texas, and Permit BG-531435 for its location at 2701 Highway 183 South, Suite A, Leander, Texas.² After Staff protested the renewal of these permits, Respondent requested a contested case hearing. The hearing was convened by ALJ Sarah G. Ramos at the State Office of Administrative Hearings, 300 W. Fifteenth Street, Austin, Texas, on October 16, 2006. Daniel Saccone appeared *pro se*, and Commission staff attorney Michael E. Cady represented the Staff. Because the hearing was not completed that day, it was reconvened for the receipt of additional evidence on November 13, 2006, and on that date, attorney Felix Rippy represented the Respondent. The record closed on December 1, 2006, after the parties had an opportunity to file written closing arguments. Notice and jurisdiction are addressed more completely in the Findings of Fact and Conclusions of Law.

II. ALLEGATIONS REGARDING CONDUCT ON THE PREMISES

A. Evidence

1. Criminal Cases

On December 4, 2005, Daniel Saccone pled guilty in the 26th District Court, Williamson County, to Display of Harmful Materials to a Minor. The offense is a third-degree felony described in TEX. PENAL CODE ANN. § 43.24(b)(3).³ On January 13, 2005, after accepting Mr. Saccone's guilty plea, the court deferred further proceedings without adjudicating his guilt and

² Respondent has another restaurant location in Round Rock that does not have a TABC permit.

³ That section defines a minor as an individual younger than 18 years and defines harmful materials as those "whose dominant theme taken as a whole: (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion; (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (C) is utterly without redeeming social value for minors."

placed Mr. Saccone on community supervision for five years, ordered him to pay a \$5,000 fine, and ordered him to perform 350 hours of community service.

Mr. Saccone's plea and the deferred adjudication arose out of an incident on July 27, 2002, during which Mr. Saccone, while on the licensed premises, displayed pornographic images that were on Respondent's computers to a minor employee. At that time, Mr. Saccone was Respondent's sole shareholder, director, and officer.

In addition, on May 11, 2005, Michael Cody, who was a manager at Respondent's Research Boulevard location, was charged with the same crime as that to which Mr. Saccone pled guilty. On June 23, 2005, in the 26th District Court, Williamson County, Mr. Cody pled guilty to the lesser offense of committing a criminal attempt on the licensed premises on July 3, 2002. The crime with which Mr. Cody was charged is a state jail felony, described in TEX. PENAL CODE ANN. § 15.01.⁴ Based upon Mr. Cody's plea, the court deferred further proceedings without an adjudication of guilt, placed Mr. Cody on community supervision for three years, and ordered him to pay a \$2,000 fine and perform 350 hours of community service. Respondent continues to employ Mr. Cody as a manager of its business.

2. Officer Robby Gadeaux

Austin Police Department (APD) Officer Gadeaux testified that he assisted the Williamson County District Attorney's office by removing computers from Respondent's premises and creating segmented, encased, mirrored, bit-for-bit copies of the hard drives. In reviewing the images on the computers, he found many images that were pornographic.⁵

⁴ A person commits the offense of criminal attempt if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended. An criminal offense attempt is one category lower than the offense attempted.

⁵ The images were offered under seal for the ALJ's *in camera* inspection. The City of Austin, custodian of the images, moved to quash the release of any images that depicted minors. The ALJ viewed a representative sampling of the many images and selected three that appeared to depict adults. They were admitted as Ex. 16.

3. TABC Investigator Bruce Boardman

Investigator Boardman, a certified police officer, testified that Staff was concerned about renewing Respondent's permits because of Daniel Saccone's guilty plea and deferred adjudication for a crime involving his minor employee. Mr. Saccone will be on community supervision until the year 2010, Investigator Boardman noted. And Respondent's continued employment of Michael Cody indicates to Investigator Boardman that the company condones his conduct.

Staff must determine whether a person is morally capable of holding a permit, Investigator Boardman added. He served with the APD for more than 29 years and has extensive training and experience in profiling sexual predators. Based on the computer images Daniel Saccone had on the computers, Investigator Boardman opined that Daniel Saccone was likely to re-offend.

4. Daniel Saccone

Daniel Saccone asserted that neither his deferred adjudication nor that of Mr. Cody should prevent Respondent from receiving a license because the men have not been convicted of any crime. The judge presiding over his and Mr. Cody's criminal cases has allowed them to retain their jobs with Respondent. To deny Respondent's renewal application would only hurt his father, Daniel Saccone testified. He relied on the change in Respondent's corporate structure to support his argument.

On May 1, 2005, Daniel Saccone gifted 5,100 shares of the corporation's stock to his father, Phillip Saccone, Sr. (Phillip Saccone), but Daniel Saccone retained the remaining 4,900 shares. Daniel Saccone resigned as director and officer, and Phillip Saccone became the director, president, and secretary of the company.

Presently, Phillip Saccone employs his son to run the day-to-day operations, and Daniel Saccone testified that he does so under the advice of his father. Whenever he feels it necessary,

Daniel Saccone goes to Respondent's licensed premises, and he can tell the store managers how to operate the stores. However, he does not go to the Round Rock location because he is limited by the terms of his community supervision as to how near a school he may be, and that location is within the distance limitation.

5. Phillip Saccone

Phillip Saccone testified he has invested about \$250,000 in Respondent business. The business takes in about \$10,000 a year in alcoholic beverage sales.

6. Michael Cody

Mr. Cody testified that he began working at Respondent's business in 1997. He left for a time but returned in 2000. He described his deferred adjudication and said the minor had worked at the Research Boulevard location for three or four months before the incident occurred for which he was charged.

B. Applicable Law

TEX. ALCO. BEV. CODE ANN. (Code) § 11.61 (b)(7) authorizes the Commission to suspend or cancel a renewal permit if the place or manner in which the permittee conducts his business warrants cancellation or suspension based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. The term "permittee" includes each officer and the owner or owners of a majority of the corporate stock. Similarly, Code § 61.71(a)(11) prohibits a permittee from allowing a person on the licensed premises to engage in conduct which is lewd, immoral, or offensive to public decency. Finally, by rule, the Commission has determined that

deferred adjudication for a felony offense may indicate that an applicant is not qualified or suitable to hold a permit.⁶

C. Analysis

The ALJ agrees with Staff that Respondent's permits should not be renewed. Daniel Saccone has pled guilty to showing obscene or pornographic images to a minor employee, and these acts occurred on the premises while he was Respondent's sole shareholder and officer. Also, while Daniel Saccone was solely responsible for the corporation, his employee engaged in a criminal attempt on the premises. While neither man has not been convicted, the evidence in this case demonstrates that the acts did occur. Daniel Saccone showed images to the minor employee that appealed to prurient interests, were patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and were utterly without redeeming social value for minors. Mr. Cody pled guilty to criminal attempt, *i.e.*, he admitted he had the specific intent to commit an offense and did an act amounting to more than mere preparation for it. The acts Mr. Saccone and Mr. Cody committed offend the public sense of decency and morals. Thus, Respondent's renewal application should be denied, pursuant to Code §§ 11.61 (b)(7) and 61.71(a)(11).

Even though Daniel Saccone is now a minority stockholder, or director, he is responsible for running the business, and Mr. Cody is responsible for managing one of the restaurants. In the ALJ's opinion, the change in corporate structure should have no bearing on this case for three reasons. First, Daniel Saccone committed the act while he was responsible for the corporation. Second, the changes in stock ownership have not changed the fact that Mr. Saccone continues to run the day-to-day operations. Finally, both Daniel Saccone and Mr. Cody hold positions of

⁶ 16 TEX. ADMIN. CODE § 33.1.

responsibility for the permittee. These facts support the conclusion that Respondent should be held responsible for what occurred in 2002 on the premises.

III. ALLEGATIONS REGARDING SUBTERFUGE

The legislature has charged the Commission with the duty of preventing subterfuge ownership,⁷ and Staff alleged that Respondent's change in corporate structure was intended to mislead the Commission about the true nature of corporate operations. Phillip Saccone and Daniel Saccone testified that Phillip contributed \$150,000 when the corporation was established and held a security interest on the corporate stock for that amount. Daniel Saccone did not disclose this fact on the TABC applications. However, the primary issue in this case was not whether Daniel had failed to disclose Phillip's involvement; rather, it was whether the corporate change was an attempt to conceal Daniel's involvement after he was placed on community supervision.

Daniel Saccone testified repeatedly that he ran the business and described his responsibilities in some detail. Based on this testimony, the ALJ finds that neither Daniel Saccone nor his father attempted to hide the fact that Daniel is the primary operator of the Respondent's business.

IV. STAFF'S REQUESTS FOR DOCUMENTS

Staff alleged that Respondent refused to respond or only partially responded to the Commission's lawful requests for documents, sent May 25, June 12, June 30, and July 27, 2006. The Commission may require the filing of reports and other data by persons engaged in the alcoholic beverage business which the Commission finds necessary to accomplish the purposes of the Code.⁸

⁷ Code § 109.53.

⁸ Code § 5.32.

Staff members Del Drake, TABC's Director of Professional Responsibility, and Gary Cutler, investigator and certified peace officer, testified about their interactions with Daniel Saccone and Phillip Saccone in which they attempted to facilitate the document production process.

Respondent provided some of the requested documents but did not provide all of them until the hearing commenced. Respondent said it did not receive one request and could not provide all of the bank records and utility bills requested without expending large sums for copying charges.

Based on Respondent's incomplete response to the request for documents until the day of the hearing, the ALJ finds that Respondent did not timely respond to the requests. However, the ALJ recommends no additional sanction for this violation because of the recommendation to not renew the permits. In the ALJ's opinion, that sanction is comprehensive enough to address any Code violations in this case.

V. FINDINGS OF FACT

Background

1. Danmarko, Inc., (Respondent) was incorporated in 1996. Daniel Saccone was issued 10,000 shares of common stock and named as the sole shareholder and officer.
2. On December 12, 2000, Respondent filed an original application for a beer and wine permit for its location at 13812 Research Boulevard B1, Austin, Williamson County, Texas.
3. On December 29, 2000, TABC issued Permit No. BG-485216 to Respondent for the Austin location.
4. On February 21, 2003, Daniel Saccone filed an original application for a beer and wine permit for Respondent's location at 2701 Highway 183 South, Suite A, Leander, Texas. Daniel Saccone listed himself as the sole shareholder and officer.

5. On February 28, 2003, TABC issued Permit No. BG-531435 to Respondent for the Leander location.
6. On February 28, 2005, Daniel Saccone filed a renewal application for the Leander location in which he acknowledged his deferred adjudication.
7. On March 29, 2005, and February 8, 2006, Phillip Saccone and Daniel Saccone filed renewal applications for the Leander location and indicated a change in corporate structure. Further, Phillip Saccone listed his total personal investment in Respondent as \$150,000.

Violations Regarding Public Decency

8. On December 6, 2004, the Assistant District Attorney for Williamson County, filed an information charging that Defendant "intentionally and knowingly hired, employed or used a minor, namely T.B., to exhibit harmful material, namely pornography, to a minor, knowing that the material was harmful and knowing T.B. was a minor."
9. On December 4, 2005, Daniel Saccone pled guilty in the 26th District Court, Williamson County, to Display of Harmful Material to a Minor, a third-degree felony committed on the licensed premises on July 27, 2002, and described in TEX. PENAL CODE ANN. § 43.24(b)(3).
10. On January 13, 2005, after accepting Daniel Saccone's guilty plea, the court deferred further proceedings without an adjudication of guilt, placed Mr. Saccone on community supervision for five years, and ordered him to pay a \$5,000 fine and perform 350 hours of community service.
11. On May 11, 2005, Michael Cody, who was a manager at Respondent's Research Boulevard location, was charged with the same crime as that to which Mr. Saccone pled guilty.
12. On June 23, 2005, in the 26th District Court, Williamson County, Mr. Cody pled guilty to the lesser offense of committing a criminal attempt on the licensed premises on July 3, 2002. The crime to which Mr. Cody pled guilty is a state jail felony, described in TEX. PENAL CODE ANN. § 15.01.
13. Based upon Mr. Cody's plea, the court deferred further proceedings without an adjudication of guilt and placed Mr. Cody on community supervision for three years and ordered him to pay a \$2,000 fine and perform 350 hours of community service.
14. Michael Cody currently manages Respondent's restaurant at Research Boulevard and sometimes works at the Round Rock location.

15. On May 1, 2005, Daniel Saccone gifted 5,100 shares of Respondent's stock to his father, Phillip Saccone, and Daniel Saccone retained the remaining 4,900 shares. Daniel Saccone resigned as director and officer of Respondent, and Phillip Saccone became the president, secretary, and sole director of the company.
16. In December 2005, Daniel Saccone and Phillip Saccone went to one of TABC's locations and explained the change in corporate structure to Staff.
17. Respondent employs Daniel Saccone to run Respondent's day-to-day operations.

Request for Information

18. On May 25, June 12, June 30, and July 27, 2006, the Commission's Staff requested documents from Respondent, pursuant to Code § 5.32.
19. Respondent provided some of the requested documents but did not provide all of them until the hearing commenced.
20. Respondent did not timely respond to the Staff's requests for information.

Procedural History and Notice

21. By letter dated April 28, 2005, Staff notified Respondent that it protested its application for the renewal of permit BG-531435 for its Leander location.
22. A notice of hearing was sent to Respondent on August 21, 2006, and included the time, date, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
23. The hearing was held at the State Office of Administrative Hearings, 300 W. Fifteenth Street, Austin, Texas, on October 16, 2006, and continued on November 13, 2006. Both parties appeared at the hearing.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. (Code) §§ 5.31, 5.33, 5.35, 11.61 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042(5).

3. Proper and timely notice of the hearing was provided as required in accordance with the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Respondent permitted a person on the licensed premises to engage in conduct which is offensive to public decency, in violation of Code § 61.71(a)(11).
5. The place or manner in which Respondent conducted its business warrants the cancellation or suspension of Respondent's permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, pursuant to Code § 11.61(b)(7).
6. Respondent failed to timely respond to Staff's requests for information, in violation of Code § 5.32.
7. Based on the Findings of Fact and Conclusions of Law, Respondent's permits should not be renewed.

SIGNED January 30, 2007.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS