

DOCKET NO. 523717

IN RE 2025 GREENVILLE AVENUE INC.	§	BEFORE THE TEXAS
d/b/a Zephyrs	§	
PERMIT NO. MB-555774	§	
	§	
	§	ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-2610)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of January, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on July 14, 2006, and closed on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 12, 2006. 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 have not 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.

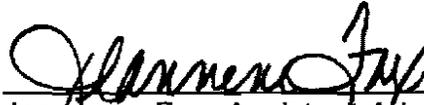
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits be canceled for cause.**

This Order will become final and enforceable on March 5, 2007, 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.

SIGNED on this 18th day of January, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Brenda Coleman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
VIA FACSIMILE: 214-956-8611

GREENVILLE AVENUE INC.
RESPONDENT
d/b/a Zephyrs
5628 Sears St.
Dallas, TX 75206
CMRRR NO. 7003 2260 0000 6465 8810

Jerry McClain
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4050

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-06-2610

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
V.		OF
2025 GREENVILLE AVENUE INC. D/B/A ZEPHYRS, Respondent		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) sought cancellation of the permits held by 2025 Greenville Avenue Inc. d/b/a Zephyrs (Respondent), alleging that Respondent knowingly possessed uninvoiced alcoholic beverages on the licensed premises in violation of the Texas Alcoholic Beverage Code (the Code). The Administrative Law Judge (ALJ) recommends that Respondent's permits be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

On July 14, 2006, a hearing convened before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Staff was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent's president and owner, John Rockenbach, appeared *pro se*. Evidence was presented and the record closed that same day.

II. DISCUSSION

A. Background

Respondent's licensed premises are located at 5628-30 Sears Street, Dallas, Dallas County, Texas. Respondent holds mixed beverage permit MB-555774 and mixed beverage late hours permit LB-555775, issued by the TABC on April 12, 2004.

B. Applicable Law

Pursuant to the Code, Petitioner may suspend or cancel a permit if it is found that the permittee violated a provision of the Code or 16 Tex. Admin. Code (TAC) § 41.50 of the TABC Rules (the Rules).¹ "Permittee" means the person who is the holder of a permit, or an agent, servant or employee of that person.² No permittee may knowingly possess or permit to be possessed on the licensed premises any alcoholic beverage which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased.³

"Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.⁴ Beer is a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight.⁵ The law requires the Commission or administrator to cancel, after notice and hearing, the permit of any permittee found by the

¹ Code § 11.61(b)(2).

² Code § 1.04(11).

³ Code § 28.06(c).

⁴ Code § 1.04(1).

⁵ Code § 1.04(15).

Commission or administrator to have violated § 28.06(c) of the Code.⁶

Invoice is defined as an instrument issued by the seller of the alcoholic beverages to a permittee.⁷ An invoice shall be issued in original and one copy in consecutive numbered order, showing the date of the sale or distribution, the purchaser and his address, the quantity, brand and class of alcoholic beverages sold, and the total price of each brand and class shown thereon. Such invoice or a copy thereof shall be delivered to the permittee and a copy of such invoice shall be kept by the seller making the invoice.⁸ Each invoice shall be kept on the licensed premises for a period of two years and shall be made available to a representative of the Commission upon reasonable request.⁹

C. Petitioner's Evidence

Petitioner contends that Respondent has operated its premises in violation of the Code and the Rules. Petitioner alleges that Respondent knowingly possessed un invoiced alcoholic beverages on the licensed premises. Therefore, Petitioner argues that cancellation of Respondent's permits is not only warranted, but mandated by the Code. Petitioner presented two exhibits and the testimony of TABC Agent Chris Aller. Agent Aller's testimony is summarized below:

On March 4, 2006, Agent Aller observed two of Respondent's employees leave the licensed premises of Urban Cowboys, located at 5631 Sears Street, Dallas, Dallas County, Texas, carrying two cases of Modelo Beer. The employees crossed the street and entered Respondent's licensed premises, located at 5628-30 Sears Street. Agent Aller then entered Respondent's licensed premises

6 Code § 28.06(d).

7 § 41.50(a)(2) of the Rules.

8 § 41.50(h)(1) of the Rules.

9 § 41.50(h)(2) of the Rules.

and observed the two employees removing the beer from its packaging and placing it into an ice tub in the bar area for sale to customers.

Respondent's president and owner, John Rockenbach, appeared when Agent Aller asked to speak with the manager or owner. Agent Aller asked Mr. Rockenbach about the beer carried across the street. Mr. Rockenbach informed the agent that he was under the impression that since it was his alcohol and he owned both Urban Cowboys and 2025 Greenville Avenue Inc., he was allowed to have the alcohol wherever he needed it. He believed that it was okay to transfer alcoholic beverages from one establishment to the other. Also, since beer, unlike liquor, has no local distributor stamp affixed to it, he believed it was permissible. The agent stated that Mr. Rockenbach had instructed Respondent's employees to go across the street to Urban Cowboys and retrieve the alcohol so that Respondent would have enough alcohol for the night.

According to Agent Aller, however, the two licensed premises, although approximately 20 feet directly across the street from one another, are operated under two separate permits. Therefore, any alcoholic beverages purchased must be invoiced from the distributor to each specifically licensed premises. When the agent asked Mr. Rockenbach if there were any invoices for the beer, Mr. Rockenbach suggested that they go to Urban Cowboys to search for the invoices. Once there, Mr. Rockenbach located invoices for the purchase of Modelo Beer for Urban Cowboys just a couple of days prior March 4, 2006. No invoices for the purchase of Modelo Beer were located for Respondent's licensed premises.

Agent Aller concluded that the Modelo Beer carried onto Respondent's premises was invoiced to Urban Cowboys. Agent Aller determined that Respondent knowingly possessed the uninvoiced alcoholic beverages on its licensed premises based on the following: (1) the agent's having witnessed Respondent's employees actually transferring the beer to Respondent's premises for sale, (2) the statement that the invoices were across the street at Urban Cowboys, (3) Mr. Rockenbach's admission that he was under the impression that the practice was allowed and had

happened before, and (5) Mr. Rockenbach's statement on March 4, 2006, that it is common for him to obtain alcohol from Urban Cowboys for use at Respondent's licensed premises.

D. Respondent's Evidence

Respondent's president and owner, John Rockenbach, testified on behalf of Respondent. His testimony is summarized below:

After Agent Aller entered Respondent's licensed premises on March 4, 2006, Respondent's general manager telephoned Mr. Rockenbach at home. Mr. Rockenbach shortly arrived at the bar. He learned that two of Respondent's employees had taken beer from Urban Cowboys' licensed premises and moved it to Respondent's premises. According to Mr. Rockenbach, this was something that he had instructed them not to do, however, he did not think that it was illegal to do so. He knew that taking stamped liquor bottles from one establishment to another was a violation of the Code. He did not recall that it was a violation of the Code to transfer beer from one location to another.

Mr. Rockenbach stated that he is not at the club often because he owns six or seven businesses. Bar ownership is not what he primarily does. The two employees involved were relatively new because of the high monthly turn-over rate in bar-back positions at his establishments.¹⁰ Therefore, mistakes are made, sometimes due to a language barrier issue with the bar-backs as well. According to Mr. Rockenbach, there is also a three-month turn-over rate in his general manager positions.

Mr. Rockenbach testified that after investigating the incident of March 4, 2006, he later discovered that there was supposed to have been a beer delivery made to Respondent's premises

¹⁰ During the hearing, Mr. Rockenbach referred to the employees as "bar-backs."

from a supplier on that day. When the beer delivery never arrived, the bar-backs thought that it was okay to pull beer from Urban Cowboys over to Respondent's premises. Mr. Rockenbach added that although he did not think that transferring beer, as opposed to liquor, was illegal, he preferred that the employees not engage in the practice at all.

He acknowledged that this practice has happened in the past, but every time that it happened, he instructed his employees not to do it. Regardless of the training provided to new employees, the situation reoccurred, in his opinion, due to the language barrier. He has tried to resolve the issue, however, it is sometimes very difficult to communicate with the employees hired to fill these positions. In his opinion, it is not worth any possible fine imposed by TABC, especially for a beer tub which may bring in a couple hundred dollars in a night. Mr. Rockenbach said that he was very honest and open with the agent about what had happened and tried to give the agent anything he requested.

Mr. Rockenbach stated that as a result of the incident on March 4, 2006, TABC issued citations to him for very large fines for both Respondent's licensed premises and Urban Cowboys. He accepts the fine for Urban Cowboys, but requests that Respondent's \$1500 fine be reduced.¹¹ He added that Petitioner's request for cancellation of the permits at the hearing, for what he perceives to have been an honest mistake, is too harsh a punishment.

III. ANALYSIS

After considering the evidence, the ALJ concludes that Petitioner has met its burden and proved that Respondent committed the violations of the Code and the Rules as alleged by Petitioner.

¹¹ Staff stated at the hearing that apparently the TABC representative who had issued a \$1500 fine to Respondent for the violation of the knowing possession of uninvoiced alcoholic beverages on the licensed premises had made a mistake in contradiction to § 28.06(d) of the Code, which requires TABC to cancel the permits for such a violation.

The ALJ believes that § 28.06(c) of the Code, which prohibits the knowing possession on the licensed premises of **any alcoholic beverage** [emphasis added] which is not covered by an invoice from the supplier from whom the alcoholic beverage was purchased is clear and speaks for itself. Mr. Rockenbach stated that he believed it was permissible to possess the uninvoiced beer on Respondent's licensed premises because, unlike bottles of liquor or distilled spirits, beer has no local distributor stamp affixed. Therefore, he was under the impression that the Code's prohibition of uninvoiced alcoholic beverages pertain only to stamped bottles of liquor.

Even if true, the statements on behalf of Mr. Rockenbach do not legally excuse or justify the violation. The Code and the Rules require each permittee to purchase alcoholic beverages from the supplier. The permittee is only authorized to have alcoholic beverages on its premises which are specifically purchased by and invoiced to the permittee under the permittee's permit number. The permittee is then required by law to maintain the invoices on the premises.¹² The Code does not include or specify any exception for licensed establishments for which joint ownership is established.

A person acts knowingly "with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist."¹³ Because it was common practice for Respondent to obtain alcohol from Urban Cowboys for use at Respondent's licensed premises, Respondent knew or should have known that the cases of beer transferred from the licensed premises of Urban Cowboys to Respondent's licensed premises on March 4, 2006, were not purchased by and invoiced to Respondent. Therefore, Respondent knowingly possessed the beer on its licensed premises in violation of the Code and the Rules.

¹² § 41.50(h)(2) of the Rules.

¹³ TEX. PEN. CODE ANN. § 6.03(b).

IV. RECOMMENDATION

Petitioner requested that Respondent's permits be canceled. A permittee's knowing possession of uninvoiced alcoholic beverages on the licensed premises in violation of § 28.06(c) of the Code is a major regulatory violation. Pursuant to § 28.06(d) of the Code, cancellation is the remedy or sanction for this violation. The ALJ is not granted authority to recommend a more lenient sanction and, therefore, recommends that Respondent's permits be canceled.

V. FINDINGS OF FACT

1. Respondent's licensed premises are located at 5628-30 Sears Street, Dallas, Dallas County, Texas.
 2. Respondent holds mixed beverage permit MB-555774 and mixed beverage late hours permit LB-555775, issued by the Texas Alcoholic Beverage Commission (TABC) on April 12, 2004.
 3. Respondent's owner, John Rockenbach, also owns Urban Cowboys, which is located approximately 20 feet directly across the street from Respondent's licensed premises.
 4. The two licensed premises are operated under two separate permits.
 5. On March 4, 2006, TABC Agent, Chris Aller, observed two of Respondent's employees transfer two cases of Modelo Beer across the street from Urban Cowboys to Respondent's licensed premises.
 6. Upon entering the premises, Respondent's employees removed the packaging and placed the beer in a tub of ice in the bar area for sale to customers.
 7. When asked about the beer, Mr. Rockenbach informed the agent that he was under the impression that since it was his alcohol and he owned both establishments, he was allowed to have the alcohol wherever he needed it. He believed that it was okay to transfer alcoholic beverages from one establishment to the other.
 8. Also, since beer, unlike liquor, has no local distributor stamp affixed to it, he believed the practice was permissible.
 9. Mr. Rockenbach stated that it was common practice to transfer alcohol from Urban
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Cowboys to Respondent's licensed premises.

10. Invoices for the purchase of Modelo Beer a few days earlier were located across the street at Urban Cowboys.
11. No invoices for the purchase of Modelo Beer for Respondent's licensed premises were ever located.
12. Respondent's owner, agent, servant or employees knew that the uninvoiced beer was possessed by Respondent on the licensed premises.
13. On June 23, 2006, Petitioner issued a notice of hearing notifying Respondent that a hearing would be held concerning Petitioner's allegations and informing Respondent of the time, place, and nature of the hearing and of the legal authority and jurisdiction under which the hearing was to be held; giving reference to the particular sections of the statutes and rules involved; and including a short, plain statement of the matters asserted.
14. The hearing was held on July 14, 2006, in Dallas, Dallas County, Texas, before Brenda Coleman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Commission Staff appeared and was represented by Timothy Griffith, Staff Attorney. Respondent appeared *pro se*. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 and §§ 6.01, 11.61 and 28.06 of the Code, as well as 16 TEX. ADMIN. CODE (TAC) § 41.50 of the TABC Rules (the Rules).
 2. SOAH has jurisdiction over all matters related 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. Chapter 2003.
 3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
 4. Respondent knowingly possessed or permitted to be possessed on the licensed premises alcoholic beverage which was not covered by an invoice from the supplier from whom the alcoholic beverage was purchased, in violation of § 28.06(c) of the Code.
 5. Respondent's permits should be canceled pursuant to § 28.06(d) of the Code.
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SIGNED September 12, 2006.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings

TB



Shelia Bailey Taylor
Chief Administrative Law Judge



September 12, 2006

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

RE: Docket No. 458-06-2610
TABC vs. 2025 Greenville Ave. Inc. D/B/A Zephyrs
TABC Case No. 523717

Dear Ms. Fox:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Brenda Coleman

Brenda Coleman
Administrative Law Judge

BC/sc
Enclosure

cc: Timothy Griffith, Agency Counsel for Texas Alcoholic Beverage Commission, **Via Fax**
2025 Greenville Ave. Inc D/B/A Zephyrs, Respondent, **Via Regular Mail**