

DOCKET NO. 581554

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
PASSIONS PRIVATE CLUB INC. D/B/A PASSIONS SPORTS BAR PERMIT/LICENSE NO(s). N555259, PE & NL	§	ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-09-2971)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION on this day, 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 April 3, 2009 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on June 1, 2009. The 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 Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 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 and licenses be **CANCELED FOR CAUSE**.

This Order will become final and enforceable on July 23, 2009 unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties in the manner indicated below.

SIGNED this the 29th day of June, 2009, at
Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150-A
Dallas, Texas 75235
VIA FACSIMILE (214) 956-8611

Passions Private Club Inc.
d/b/a Passions Sports Bar
RESPONDENT
1229 S Montreal
Dallas, TX 75208
VIA REGULAR MAIL

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas Enforcement District Office

SAL/aa

STATE OFFICE OF ADMINISTRATIVE HEARINGS**DALLAS OFFICE****6333 Forest Park Road Suite 150a****Dallas, Texas 75235****Phone: (214) 956-8616****Fax: (214) 956-8611**

DATE: **06/01/2009**
 NUMBER OF PAGES INCLUDING THIS COVER SHEET: **12**
 REGARDING: **PROPOSAL FOR DECISION**
 DOCKET NUMBER: **458-09-2971**

JUDGE BRENDA S COLEMAN**FAX TO:****FAX TO:****SHELIA A. LINDSEY (TEXAS ALCOHOLIC BEVERAGE
COMMISSION)****(713) 426-7965****Passions Private Club d/w/a Passions Sports Bar****VIA REGULAR MAIL****ALAN STEEN (TEXAS ALCOHOLIC BEVERAGE
COMMISSION)****(512) 206-3350****LOU BRIGHT GENERAL COUNSEL (Alcoholic Beverage
Commission, Texas)****(512) 206-3498****NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT LEIGH NOLAN(lda) (214) 956-8616**

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State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 01, 2009

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA FACSIMILE 512/206-3203

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
PASSIONS PRIVATE CLUB, INC. D/B/A PASSIONS SPORTS BAR
SOAH DOCKET NO. 458-09-2971**

Dear Mr. Steen:

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink that reads "Brenda Coleman".

Brenda Coleman
Administrative Law Judge

BC/lnn
Enclosure

Xc: Shelia A. Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 713/426/7965**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, **VIA FACSIMILE 512/206-3498**
Passions Private Club, **VIA REGULAR MAIL 1229 S. Montreal Dallas, Texas 75208**

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SOAH DOCKET NO. 458-09-2971

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
PASSIONS PRIVATE CLUB INC.	§	
D/B/A PASSIONS SPORTS BAR,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission or Petitioner) brought this enforcement action against Passions Private Club Inc. d/b/a Passions Sports Bar (Respondent). Petitioner sought cancellation of Respondent’s permits, alleging that Respondent has engaged in conduct prohibited by the Texas Alcoholic Beverage Code (the Code) and/or Commission’s rules (the Rules). The Administrative Law Judge (ALJ) recommends cancellation of Respondent’s permits.

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.

On April 3, 2009, a hearing convened before State Office of Administrative Hearings (SOAH) ALJ Brenda Coleman. Petitioner was represented at the hearing by Shelia Lindsey, TABC Staff Attorney. Respondent’s president, David Cantu, Jr., appeared on behalf of Respondent. Evidence and argument were presented. The record closed on the same date.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

The Commission may suspend or cancel a permit if it is found that a permittee has violated a provision of the Code or the Rules.¹ A private club registration permit authorizes alcoholic beverages belonging to members of the club to be served for on-premises consumption to its members and guests.² Members of the club must be passed on and elected by a membership committee made up of three or more club members.³ The chairman of the membership committee may issue preliminary memberships without the approval of the committee for a period not exceeding seven days from the date of application.⁴

A club is required to have 50 or more members at all times. When considering a membership application or termination of membership, the membership committee must keep written minutes showing the meeting date, names of all committee members present, and the name of any person admitted to membership or terminated from membership. The club must permanently maintain a roster of each admitted or removed member. All records and minutes are required to be kept on the club premises and made available to any representative of the Commission upon reasonable notice.⁵ The club's affairs and management must be conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting.⁶

¹ Code § 11.61(b)(2).

² Code § 32.01(a)(2).

³ Code § 32.03(c).

⁴ Code § 32.03(d).

⁵ Rules §§ 41.52(c)(1)(A), (B), (D) and (E).

⁶ Code § 32.03(i).

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The replacement of all alcoholic beverages must be paid for either by money assessed equally from each member and collected in advance or by the establishment of an alcoholic beverages replacement account in which a designated percentage of each charge for the service of alcoholic beverages, as determined by the club's governing body, is deposited. No money other than the designated percentage of service charges may be deposited into the replacement account. The club's governing body may transfer from the replacement account to the club's general operating account any portion of the replacement account that is determined to be in excess of the amount that will be needed to purchase replacement alcoholic beverages.

The club is required to maintain a monthly record of the total amount of alcoholic beverage service charges collected, the amount deposited in the replacement account, the amount used to purchase alcoholic beverages, and the amount transferred to the general operating account.⁷ It is permissible to combine the alcoholic beverages replacement account, general operating account, and any other account into a single master account if the master account is maintained in accordance with generally accepted accounting principles and the club is able to generate statements reflecting the funds allocated to each component account.⁸

The Code declares:

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.

⁷ Code § 32.06(a) and (b).

⁸ Code § 32.06(c).

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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. Any device, scheme or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.⁹

B. Background

The following is undisputed by the parties. Respondent holds a private club registration permit, private club late hours permit, and beverage cartage permit, issued by the Commission on April 4, 2004, for its premises located at 1922 Fort Worth Avenue, Dallas, Dallas County, Texas. David Cantu, Jr., serves as Respondent's president.

Prior to the issuance of Respondent's permits, Mr. Cantu received a copy of Chapter 32 of the Code pertaining to private clubs, along with pertinent sections of the Rules. Commission compliance personnel also personally met with Mr. Cantu for a comprehensive interview. During the interview, Mr. Cantu acknowledged, as evidenced by his signature, that violations of the Code or the Rules by him or his employees could result in a suspension or cancellation of Respondent's license and/or permit.¹⁰ Record keeping requirements regarding membership and accounts for a private club were covered in detail.¹¹

C. Evidence and Contentions

1. Petitioner's case

⁹ Code § 109.53.

¹⁰ Ex. P-4(a) is a copy of the Acknowledgment of Application Interview signed by Mr. Cantu on March 10, 2004.

¹¹ Ex. P-4(b) is a copy of the Acknowledgment of Record Keeping Requirements signed by Mr. Cantu (evidencing receipt and understanding of the topics explained by the interviewer) on March 10, 2004, and April 10, 2004.

Petitioner contends that Respondent failed to adhere to required rules and regulations for private clubs and engaged in subterfuge by surrendering control of its premises to someone other than Respondent. Specifically, Petitioner alleges that Mr. Cantu exercised financial and operational control over the business instead of Respondent. In support of its position, Petitioner presented the testimony of Shelia Maloy, an auditor with the Commission.

Ms. Maloy testified that she routinely conducts audits and reviews private club documents for regulatory compliance. On September 3, 2008, she notified Mr. Cantu, in writing, of her intention to conduct an audit of Respondent's premises on September 10, 2008, for the period ranging from April 5, 2004, through August 31, 2008. Ms. Maloy said she informed Mr. Cantu what records and documents he was required to produce for the audit, *i.e.*, preliminary membership applications, membership committee minutes, membership rosters, bank records, gross receipts, records of annual meetings, and annual tax returns.

Ms. Maloy stated that private clubs are required to maintain the following types of records on the premises: preliminary membership applications which are signed and dated; properly signed minutes of membership committee meetings to verify that the committee actually met to vote the members into the club; and monthly membership rosters of all members that have either been added or removed. On September 10, 2008, Mr. Cantu admitted that he was not properly keeping the required records. Respondent only had a few preliminary membership applications from April 2004. When questioned about the missing applications, Mr. Cantu responded that he threw them away. Respondent failed to maintain any membership rosters for the club on the premises. Mr. Cantu had to contact an off-site company, ID Pro, to request that the rosters be delivered to Respondent's premises. Only two years of rosters from April 2006 through May 2008 were provided.

According to Ms. Maloy, Respondent did provide minutes for membership committee meetings from April 2004 through May 2008, but a lot of them were not properly signed by committee members. Respondent was also missing four months of minutes, from May 2008 through

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August 2008. Ms. Maloy stated that pursuant to the Rules, preliminary members must be voted in within seven days of the signed preliminary membership application. When questioned about the minutes, Mr. Cantu responded that the membership committee met whenever it could and no regular meeting schedule was ever established. She also added that in February 2007, Respondent received a warning for failure to produce requested minutes.

Ms. Maloy testified that Respondent, as a private club, is a separate entity that is operated for the benefit of the members. Alcoholic beverages are purchased and owned by the members rather than the business. Officers are primarily there as elected officials to manage the club. According to Respondent's by-laws, the purchase of alcoholic beverages would be made from a replacement account in which Respondent would track the daily service charges for alcoholic beverages, then deposit 35 percent of the gross receipts into the replacement account. Respondent's by-laws also designated that 65 percent be deposited into an operating account for the club's operating expenses. She said the alcoholic beverage replacement account and operating account are required to be maintained in accordance with generally accepted accounting principles reflecting the funds allocated to each account. However, in this case, Mr. Cantu was unable to produce any ledgers or statements reflecting the funds allocated to either account.

According to Ms. Maloy, on the day of the audit, Respondent did not have any records for alcoholic beverage sales. Mr. Cantu stated that the club had not sold very much. Respondent's bank records reflected that very little money was deposited into either account. Ms. Maloy said she had no way of tracing the money in the account to the amount of alcohol sold by the club. She also said it appeared that just enough money was deposited into the replacement account to cover the actual amount spent on the purchase of alcoholic beverages rather than the designated percentage specified in Respondent's by-laws. For the operating account, it appeared that just enough money was deposited into the account to cover Respondent's sales taxes, as was determined by Mr. Cantu, based on Respondent's purchase of alcoholic beverages rather than the designated percentage. Mr. Cantu produced no records to show any expenses for the club. He said he paid for Respondent's utilities

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and other expenses with cash or money orders.

Based on her inspection of Respondent's records on September 10, 2008, Ms. Maloy determined that Respondent's premises were not being operated in compliance with the Code and Rules. Ms. Maloy opined that Respondent's failure to maintain required records and accounts, in this case, is evidence of subterfuge. She said Respondent's original application filed with the Commission included a management contract and a sublease agreement in which Respondent agreed to pay management fees to Mr. Cantu for managing the club and sublease fees for the club's use of his property. However, Mr. Cantu provided no records or documentation showing that either fee was ever paid. She added that failure to do so is evidence of subterfuge.

Ms. Maloy also stated that Respondent should have filed tax returns under its tax identification number obtained from the IRS for 2004 through 2008. She requested Respondent's tax returns and agreed to allow Mr. Cantu until September 30, 2008, to provide them to her. However, he never submitted any tax returns on behalf of Respondent. She determined that Respondent had relinquished control of the premises to Mr. Cantu, who was benefiting from the operation of the club instead of the members.

2. Respondent's case

Mr. Cantu presented no evidence on behalf of Respondent. He argued that (1) Respondent lacked the financial ability to properly conduct its business pursuant to the rules and (2) the violations do not warrant cancellation of the permits.

D. Analysis

As a result of Mr. Cantu's having attended the comprehensive interview sponsored by the Commission prior to the issuance of Respondent's permits, Respondent knew, or should have

known, the appropriate requirements for operating a private club. Respondent has an obligation to abide by the provisions of the Code and the Rules, and is accountable for failing to meet this obligation. Inspection of Respondent's records on September 10, 2008, indicated that over the four-year period, Respondent engaged in improper record keeping with regard to membership records, purchases of alcoholic beverages, and general operation and management of the club in violation of its own by-laws, the Code and the Rules.

There was insufficient information found during the audit to establish that Respondent had paid any rent for the premises or any management fees as required. Respondent also failed to implement an appropriate method of accounting for club funds. It is undisputed that at the time of the audit, Respondent failed to generate statements reflecting the funds allocated to Respondent's replacement account and operating account. Therefore, Respondent was not maintaining its accounts in accordance with generally accepted accounting principles pursuant to § 32.06(c) of the Code.

Respondent's argument that its non-compliance and record keeping violations were the result of financial difficulty is neither credible nor persuasive. It appears from the totality of the factors considered that Respondent was not operating independently of Mr. Cantu's control, but in a manner that constitutes a serious violation of the Code. According to the Commission's standard penalty chart, subterfuge is a major regulatory violation for which the only sanction is cancellation.¹² Therefore, the ALJ recommends that Respondent's permits be cancelled.

III. FINDINGS OF FACT

1. Passions Private Club d/b/a Passions Sports Bar (Respondent) holds a private club registration, private club late hours permit, and beverage cartage permit, issued by Petitioner on April 5, 2004, for its premises located at 1922 Fort Worth Avenue, Dallas, Dallas County, Texas.
2. David Cantu, Jr. serves as Respondent's president.

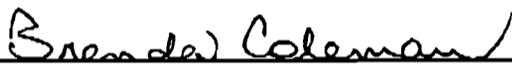
¹² 16 TEX. ADMIN. CODE ANN. (TAC) § 34.3.

3. On March 10, 2004, and April 10, 2004, Mr. Cantu attended a comprehensive interview with the Commission's compliance personnel in which all of the record keeping requirements of a private club were covered in detail.
4. On September 3, 2008, Shelia Maloy, an auditor with the Commission, notified Mr. Cantu, in writing, that an audit was scheduled to be conducted on Respondent's premises on September 10, 2008.
5. Ms. Maloy informed Mr. Cantu of the necessary records and documents required for the audit period of April 5, 2004, through August 31, 2008.
6. On September 10, 2008, Ms. Maloy conducted an audit of Respondent's records.
7. Respondent failed to properly maintain preliminary membership applications, minutes of membership committee meetings, and membership rosters on the premises.
8. Respondent deposited money other than the designated percentage into the alcoholic beverages replacement account.
9. Respondent paid for the replacement of alcoholic beverages from money other than money in the replacement account.
10. Respondent failed to maintain a monthly record of the total amount of alcoholic beverages service charges collected, the amount deposited in the replacement account, the amount used to purchase alcoholic beverages, and the amount transferred into the club's general operating account.
11. Respondent permitted, consented to, or allowed an unauthorized person to use or display a permit or license in the conduct of business.
12. On March 10, 2009, Petitioner issued its notice of hearing to Respondent.
13. 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.
14. A hearing convened before SOAH ALJ Brenda Coleman on April 3, 2009. The Commission appeared through its Staff Attorney, Shelia Lindsey. Respondent's president, David Cantu, Jr., appeared on behalf of Respondent. Evidence and argument were presented. The record closed on the same date.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN., Ch. 5 and §§ 11.61, 32.06, and 109.53.
2. The State Office of Administrative Hearings 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. Ch. 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 engaged in conduct in violation of TEX. ALCO. BEV. CODE ANN. (the Code) § 32.06 and 16 TEX. ADMIN. CODE ANN. § 41.52.
5. A preponderance of the evidence shows that Respondent surrendered control of the business to a person other than Respondent in violation of TEX. ALCO. BEV. CODE ANN. §109.53.
6. Respondent's permits should be canceled.

SIGNED June 1, 2009.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS