DOCKET NO. 458-09-2970

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	
	§	**OF**
GERM INTERNATIONAL, LLC, D/B/A CLUB VENOM,	§	
Respondent	§	
(TABC DOCKET NO. 581858)	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this action against Germ International LLC d/b/a Club Venom (Respondent), alleging that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE §§ 105.06(5), 11.61(b)(2), 61.71(a)(18), and/or 32.17(a)(7). TABC seeks either a 12-day suspension of Respondent's permit or payment of a penalty of $300 per day in lieu of suspension. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) concludes that TABC has proven its allegation by a preponderance of the evidence. For the reasons set out below, the ALJ recommends that Respondent's permit be suspended for three days or, in the alternative, that Respondent be given the opportunity to pay a penalty of $150 per day in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 104.01(5). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015, and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding. On May 8, 2009, an evidentiary hearing convened before ALJ

John H. Beeler in San Antonio, Texas. TABC was represented by attorney Matthew Clark. Respondent was represented by one of its owners, Sam Mizyed. The hearing concluded and the record was left open to allow Respondent to provide a written statement from the individual alleged to have been consuming alcohol during prohibited hours. The record closed on May 15, 2009, after the receipt of that document.

II. DISCUSSION AND ANALYSIS

A. Applicable Law

State law prohibits the consumption of alcoholic beverage on licensed premises during certain hours. Specifically, TEX. ALCO. BEV. CODE ANN. § 105.06 provides:

> HOURS OF CONSUMPTION. (a) In this section:
>
> (1) "Extended hours area" means an area subject to the extended hours of sale provided in Section 105.03 or 105.05 of this code.
>
> (2) "Standard hours area" means an area which is not an extended hours area.
>
> (a-1) For the purposes of this section, a licensed or permitted premises is a public place.
>
> (b) In a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a. m. and 12 noon or on any other day between 12:15 a. m. and 7 a. m.
>
> (c) In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a. m. and 12 noon and on any other day between 2:15 a. m. and 7 a. m.

Further, TEX. ALCO. BEV. CODE ANN. § 61.71 provides:

> GROUNDS FOR CANCELLATION OR SUSPENSION: RETAIL DEALER.
>
> (a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

* * * * *

> (18) consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code;

B. Evidence and Arguments

Petitioner offered three documents and the testimony of two witnesses, both TABC agents. Mr. Mizyed testified for Respondent and offered the written statement of Hever Carranza.

1. Testimony of Tulita Harris

Ms. Harris testified she is employed as a TABC agent and observed that facts made the basis of the allegation of this hearing. On November 8, 2008, she and TABC agent Nina Gonzales, went to Club Venom because of a complaint of after-hours consumption of alcohol. At approximately 2:45 a.m., she looked though through a gap in some blinds, and observed a male sitting at the bar drinking a beer.

Agent Harris further testified that she notified Agent Gonzales, who went to the front door and knocked. Agent Harris stayed where she was to see if the male attempted to hide the beer. The male unlocked and opened the door and Agent Gonzales entered the club. Agent Harris soon followed. On the bar they found a half-empty bottle of Miller Lite. It was cold to the touch. The male, identified as Hever Carranza, denied drinking the beer.

Agent Harris acknowledged that she and Agent Gonzalez have been to Club Venom on other occasions and that she cannot recall any other violations.

2. Testimony of Nina Gonzales

Agent Gonzales testified to the same basic facts set out above.

3. TABC Documents

TABC offered a copy of the Notice of Hearing, the license history of the premises, and the incident report for this case. All were admitted without objection.

4. Testimony of Sam Mizyed

Mr. Mizyed testified that he is one of the owners of the bar but was not present at the time of the alleged violation. He had been at the bar earlier but had become ill and ask a friend to lock up the bar so he could leave. The friend, Hever Carranza, was not an employee of the club. Further, Mr. Carranza's only duty for the night was to lock the door at closing time.

Mr. Mizyed further testified that he has only owned the club for a short time and had worked hard to make it a clean operation. He has had no prior violations, but has seen the two agents on the premises.

5. Written Statement of Hever Carranza

Mr. Carranza, in his statement, asserts that the beer found on the bar was one that he picked up from a table and that he was not drinking after hours.

C. The ALJ's Analysis

The ALJ concludes that TABC has shown, by a preponderance of the evidence, that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours. The TABC agents' testimony was consistent and logical, and no reason for them to have made up the story was offered. Mr. Mizyrd testified that he told Mr. Carranza that his only task was to lock the door at closing time. However, that is not what Mr. Carranza did. After the club had closed, he remained there for quite some time. It was undisputed that the agents observed him there at 2:45 a.m. Agent Harris testified she observed him drinking a beer at that time, and it is a logical conclusion that that he remained on the premises to drink the beer.

Petitioner recommends a suspension of 12 days or a civil penalty of $300 per day. The ALJ concludes the recommendation is excessive. This is not a situation where Respondent kept the club open during prohibited hours for financial gain. Rather, it is simply a situation where Mr. Mizyrd used poor judgment in his choice of who to trust with following his instructions. Further, there have been no adjudicated violations since Respondent has owned the club. The ALJ, therefore, recommends a suspension of three days and that Respondent be allowed to pay a civil penalty of $150 per day in lieu of suspension.

In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. Germ International d/b/a Club Venom (Respondent) holds Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB615855 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Club Venom) located at 2407 N. Marys Street, San Antonio, Bexar County, Texas. This permit was in effect on November 8, 2008.

2. On November 8, 2008, TABC agents Gonzales and Harris observed Hever Carranza consuming an alcoholic beverage on the premises at 2:45 a.m.

3. Sam Mizyed, one of the owners of the club, had instructed Mr. Carranza to lock up the club at closing time.

4. Respondent has had no adjudicated violations since the present owners purchased the club.

5. On April 27, 2009, TABC sent a notice of hearing to Respondent stating that a hearing would be held on this matter on May 8, 2009, at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas.

5. The Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained a reference to the particular sections of the statutes and rules involved, and a short plain statement of the allegations and the relief sought by TABC.

6. On May 8, 2009, the evidentiary hearing convened in San Antonio, Texas, before ALJ John H. Beeler. TABC was represented at the hearing by attorney Matthew Clark.

Respondent was represented by one of its owners, Sam Mizyed. The hearing concluded that day and the record closed on May 15, 2009, after Respondent submitted a document.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 61.71(a)(18).

2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015 and TEX. GOV'T CODE ANN. § 2003.021.

3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.

4. TABC has shown, by a preponderance of the evidence, that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE § 105.06.

5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB615855 should be suspended for 3 days. In the alternative, Respondent should be given the opportunity to pay a penalty of $150 per day in lieu of suspension.

SIGNED on July14, 2009.

JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS