

DOCKET NOS. 582077 & 588327

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
MELMAT INC. D/B/A EL CUBO PERMIT/LICENSE NO(s). MB678477, LB & PE & FB DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-09-2193)	§ § § § § § § §	ALCOHOLIC BEVERAGE COMMISSION

ORDER

The above-styled and numbered cause is before the Assistant Administrator, Texas Alcoholic Beverage Commission, for consideration and entry of the agency order.

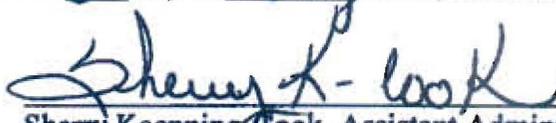
After proper notice was given, this case was heard by Administrative Law Judge Richard R. Wilfong. The hearing convened on January 7 and 8, 2010. The record closed upon receipt of the written closing arguments and legal briefs on March 15, 2010. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 30th day of March, 2010. 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. No exceptions were filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission has reviewed and considered the Proposal for Decision and adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge as Findings of Fact and Conclusions of Law of the Commission.

IT IS THEREFORE ORDERED that the permits issued to Melmat Inc. d/b/a El Cubo by the Texas Alcoholic Beverage Commission are CANCELLED and the renewal is DENIED.

This Order will become final and enforceable on the 31st day of May, 2010

SIGNED this the 3rd day of May, 2010, in Austin, Texas.



 Sherry Koenning Cook, Assistant Administrator
 Texas Alcoholic Beverage Commission

EEH/cb

CERTIFICATE OF SERVICE

I certify that I have served copies of the above Order on the parties shown below in the manner indicated on May 4, 2010.



Cecelia Brooks, Paralegal
TABC Legal Section
Texas Alcoholic Beverage Commission

Honorable Judge Richard R. Wilfong
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
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ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office

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Evidence was received from both parties on those dates. The record closed upon receipt of the written closing arguments and legal briefs on March 15, 2010.

II. LEGAL STANDARDS AND APPLICABLE LAW

A holder of a mixed beverage permit may be issued a food and beverage certificate by the commission if the gross receipts of mixed beverages sold by the holder are 50 percent or less of the total gross receipts from the premises. TEX. ALCO. BEV. CODE ANN. § 28.18.

The commission or administrator may ... cancel an original or renewal permit if it is found, after notice and hearing, that ... the permittee made a false or misleading statement in connection with his original or renewal application, either in the formal application itself or in any other written instrument relating to the application submitted to the commission. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(4).

III. EVIDENCE PRESENTED

Staff presented one witness and 26 exhibits that were admitted. Respondent presented one witness and six exhibits that were admitted.

TABC witness Steve Boyer

Steve Boyer is a senior Staff auditor. He testified that on December 2, 2008, Respondent submitted its sworn renewal application.¹ The renewal application reported sales for the period May 2008 through October 2008.² Sales of alcoholic beverages were reported to be \$22,315.00 and food sales were reported to be \$37,548.00, for those months.³ These sales figures were reported as actual sales rather than estimates.⁴

¹ TABC Ex. 7. Tr. 1737.

² Tr. 1721-1722.

³ Tr. 1738. TABC Ex. 7.

⁴ Tr. 1729, 1733, and 1826.

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On January 21, 2009, Mr. Boyer commenced a depletion analysis concerning El Cubo by presenting a letter to Un Suk Chu, Respondent's president, requesting, among other things, three months of records relating to purchases and sales of food and alcoholic beverages. The purpose of the analysis was to determine the ratio of sales of alcoholic beverages to sales from food service so as to determine whether the Respondent was in compliance with the food and beverage certificate.⁵ Several days later, Ms. Chu provided a substantially incomplete and inadequate response to the request. When Mr. Boyer followed-up in a further effort to obtain the requested information, he specifically requested that Ms. Chu provide daily cash register tapes rather than the few vendor receipts that had been provided. Ms. Chu responded that she did not have cash register receipts because she did not know how to operate the cash register. Mr. Boyer said that he found Ms. Chu's explanation for not having sales records very unusual and inconsistent with customary practice.⁶ Due to the lack of any meaningful records from Respondent, Mr. Boyer was required to go to wholesale liquor suppliers for sales made to El Cubo,⁷ and the State Controller's Office for information concerning beer and food sales.⁸ Mr. Boyer also conducted a physical inventory of beer and liquor on the premises.⁹

Part of Mr. Boyer's audit was to determine the price for which each drink was sold. This is normally easily accomplished by reference to cash register tapes or daily sales summaries.¹⁰ However, because Respondent had no records to prove the amount charged for drinks, Mr. Boyer used \$5.00 based on reports of undercover buys at El Cubo from September and December 2008.¹¹ Based on the data gathered, Mr. Boyer determined that the amount of alcoholic beverage sales for the reporting period was \$292,650.00 as compared to the \$22,315.00 that Respondent reported on the

⁵ Tr. 1715. TABC Ex. 2.

⁶ Tr. 1717.

⁷ TABC Ex. 5.

⁸ Tr. 1720-1722.

⁹ Tr. 1724-1726. TABC Exs. 17, 18, 19, and 20.

¹⁰ Tr. 1805-1806.

¹¹ Tr. 1794-1796.

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December 2, 2008 renewal application.¹² Moreover, based on Mr. Boyers determination of Respondent's purchases of alcoholic beverages and inventory on hand, the amount of alcoholic beverage sales during the reporting period could have been as high as \$371,334.00.

The ratio of alcoholic beverage sales to food sales using an average price of \$5.00 per drink was 89.66 percent. When the average price was reduced to \$4.00 the ratio only dropped to 89.49 percent. When the price of half of the drinks was further reduced to \$2.50 the ratio only dropped to 86.80 percent.¹³

The amount of food sales reported by Respondent on the renewal application was \$37,548.00. Mr. Boyer accepted this amount as it matched the amount of food sales Respondent reported to the Comptroller's Office. Additionally, this rather low number was consistent with inspections at El Cubo on September 11, 2008, and December 2, 2008, resulting in the issuance of warnings to Respondent for not providing food service. Also, when Mr. Boyer went to El Cubo on January 21, 2009, he found no food service was being offered.¹⁴ In contrast, Mr. Boyer indicated that Respondent's food sales would need to have been more than \$266,000.00 greater for the ratio of alcoholic beverage sales to food sales to be less than the maximum 50 percent required to qualify for a food and beverage certificate.

Mr. Boyer acknowledged that he made two calculation errors in his reconstruction of Respondent's alcoholic beverage sales. However, both errors favored the Respondent and if corrected would cause the numbers reported by Respondent to be even more egregiously false.¹⁵

¹² Tr. 1731, 1760, 1779, 1803-1805, 1836-1837, and 1843. TABC Ex. 6.

¹³ TABC Ex. 6. Tr. 1854-1857.

¹⁴ Tr. 1836-1837. TABC Ex. 10.

¹⁵ Tr. 1728 and 1771-1772.

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El Cubo witness Dexter E. Simpson

Dexter E. Simpson testified for El Cubo as an expert regarding TABC regulation and enforcement. He testified with reference to photographs taken inside El Cubo. In particular, he testified regarding a photograph of a sign advertising "happy hour" beer prices of \$2.00 and \$2.50, indicating that Respondent sold some beer for less than the \$5.00 assumed by Mr. Boyer.¹⁶

Mr. Simpson had worked with Mr. Boyer during more than nine years that Mr. Simpson was employed at TABC, and he was very complimentary of Mr. Boyer's competence and the accuracy of his audit work, but he was critical of the audit of El Cubo claiming that it was rushed due to other demands that TABC placed on Mr. Boyer. He emphasized the two mistakes that Mr. Boyer admitted claiming that he had never seen Mr. Boyer make a mistake on an audit. Mr. Simpson also alluded to communication problems because Ms. Chu is Korean and speaks and understands very little English. He faulted TABC for not providing an interpreter to ensure that Ms. Chu would understand what was being asked of her in connection with the audit, and so she could respond appropriately. He also claimed that Ms. Chu had settled prior alleged TABC violations without an adequate understanding of the ramifications, and because of undue pressure from TABC. He indicated that because of the language barrier and cultural differences, Ms. Chu was incompetent to handle the prior alleged violations appropriately and, therefore, had acted contrary to her best interests. Mr. Simpson claimed that Ms. Chu sincerely wants to do business at El Cubo in a compliant manner, and he was sure that she could do so in the future with his guidance and assistance as a consultant. He further claimed that Ms. Chu obtained the food and beverage certificate out of naïve desire to have a restaurant that turned out to be unsuccessful, but she did not intend to mislead or misinform in any way. He contended that she was simply an unsophisticated business person that did not fully understand her obligations as a permittee, and who found herself in an uncomfortable situation hampered by the language barrier.¹⁷ Mr. Simpson recommended that El Cubo should be allowed to stay in business as

¹⁶ Tr. 1870.

¹⁷ Tr. 1877-1880.

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only a bar. On cross-examination, Mr. Simpson acknowledged that on each occasion when he met with Ms. Chu in preparation for the hearing, she had someone with her that acted as an interpreter.¹⁸ When asked why Ms. Chu did not have someone to assist and interpret for her when she met with Mr. Boyer, Mr. Simpson said he did not know.¹⁹

IV. DISCUSSION

The ALJ found the testimony of Mr. Boyer to be persuasive. His vast experience and high level of competence was appropriately acknowledged by Respondent's expert witness Mr. Simpson. However, Mr. Simpson's criticism of the audit of El Cubo based on two calculation errors that favored the Respondent, and the failure to provide an interpreter to overcome a perceived language barrier, was not persuasive. This is not a case where the permittee undoubtedly operated a restaurant, but inadvertently failed to satisfy the 50 percent ratio by a small amount. In sharp contrast to that scenario, El Cubo had been warned on multiple occasions for not providing any food service whatsoever, and the deficiency in the amount of food sales needed to offset the amount of alcoholic beverage sales, as reconstructed by Mr. Boyer, was enormous -- \$37,548.00 actual food sales reported versus additional required food sales in excess of \$266,000.00. Respondent's reporting of only \$22,315.00 of alcoholic beverage sales was even more egregious when actual sales were found to be more than ten times that amount. The ALJ finds Respondent's attempt to justify these huge discrepancies as being attributable to Respondent's lack of understanding, inability to operate a cash register, and a language barrier, to be woefully lacking credibility. Conversely, the ALJ is persuaded based on the clear preponderance of credible evidence, that Respondent flagrantly violated §§ 11.61(b)(2) and (4) of the Code. In reaching this conclusion the ALJ is mindful that permits to sell alcoholic beverages, and the added benefits of a food and beverage certificate, were bestowed upon Respondent as a privilege with the corresponding obligation to fully comply with the Code, or be subject to revocation. Respondent's gross failure to provide business records, maintain required

¹⁸ Tr. 1881-1883.

¹⁹ Tr. 1884.

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ratios, and provide accurate information under oath, is more than adequate reason to cancel Respondent's permits. This is especially true considering Respondent's previous violations and warnings. Respondent's conduct shows blatant intent to deceive rather than mistake, error, or inaccuracy; therefore, the ALJ recommends that Respondent's permits be cancelled and the renewal application be denied.

V. FINDINGS OF FACT

1. On December 7, 2007, Melmat, Inc. d/b/a El Cubo (Respondent) was issued Mixed Beverage, Mixed Beverage Late Hours and Beverage Cartage permits, and a Food and Beverage certificate for the premises known as El Cubo located at 2900 Walnut Hill Lane, Suite 202, Dallas, Dallas County, Texas (licensed premises).
2. On December 2, 2008, Respondent signed and swore to its first renewal application reporting for the period May 2008, through October 2008, sales of alcoholic beverages of \$22,315.00, and sales from food service of \$37,548.00.
3. On December 2, 2008, Respondent knew that sales of alcoholic beverages were substantially greater than food sales.
4. For the period May 2008, through October 2008, Respondent's actual sales of alcoholic beverages were at least \$292,360.00, and possibly as high as \$371,334.00.
5. For the period May 2008, through October 2008, Respondent's sales of alcoholic beverages were approximately 90 percent and Respondent's food sales were approximately 10 percent of Respondent's total sales.
6. During the period May 2008, through October 2008, Respondent was a bar and not a restaurant.
7. On November 6, 2009, the Texas Alcoholic Beverage Commission (TABC) Staff sent an amended notice of hearing to Respondent informing Respondent of the date, time, location and nature of the hearing; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and relief sought by TABC.
8. On January 7 and 8, 2010, a public hearing was convened before Administrative Law Judge, Richard R. Wilfong, at the State Office of Administrative Hearings, 300 Forest Park Road, Dallas, Texas. Staff appeared through attorney Emily Helm, and attorney Dan Estrada appeared on behalf of Respondent. The record closed upon receipt of written closing arguments and legal briefs on March 15, 2010.

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9. Respondent knowingly made false statements in the application for renewal submitted on December 2, 2008, with intent to deceive.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters relating to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, in accordance with TEX. GOV'T. CODE ANN. § 2003.
3. The Respondent received proper and timely notice of the hearing, pursuant to TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing Findings of Fact, Respondent violated TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2) and (4).
5. Based on the foregoing Findings of Fact, Respondent violated TEX. ALCO. BEV. CODE ANN. § 28.18.
6. Based on the foregoing Findings of Fact, Respondent violated 16 TEX. ADMIN. CODE § 33.5.
7. Based on the foregoing Findings of Fact and Conclusions of Law, the cancellation of Respondent's permits and certificate is warranted, and the renewal application should be denied.

SIGNED March 30, 2010.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS