

DOCKET NO. 579176

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
TIJERINA & VASQUEZ	§	
D/B/A JUANITO'S 2000 NIGHT CLUB	§	ALCOHOLIC
PERMIT/LICENSE NO(s). MB462671, LB &	§	
PE	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO.458-09-3289)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 19th day of August, 2009, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Roshunda Pringle. The hearing convened on May 1, 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 July 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/or licenses be **CANCELED FOR CAUSE**.

This Order will become final and enforceable on September 14, 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 19th day of August, 2009, at
Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE

State Office of Administrative Hearings
2010 N. Loop West, Suite 111
Houston, Texas 77008

VIA FACSIMILE: (713) 812-1001

Edward P. Sillas

ATTORNEY FOR RESPONDENT

8400 Howard Drive
Houston, TX 77017

VIA FACSIMILE: 713-645-1522

Juanito's Inc.

D/B/A Juanito's 2000 Night Club

RESPONDENT

338 S Wayside Dr.
Houston, TX 77011

VIA U.S. FIRST CLASS MAIL

Ramona M. Perry

ATTORNEY FOR PETITIONER

TABC Legal Section

Licensing Division

Houston Enforcement District Office

RMP/aa

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 1, 2009

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

VIA REGULAR MAIL

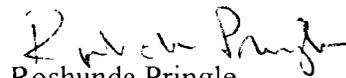
RE: Docket No. 458-09-3289; Texas Alcoholic Beverage Commission vs. Arnoldo Tijerina & Juan A. Vasquez d/b/a Juanito's 2000 Night Club

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

Sincerely,


Roshunda Pringle
Administrative Law Judge

RP/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Edward P. Sillas, Attorney At Law, 8400 Howard Drive, Houston, Texas 77017 -**VIA REGULAR MAIL**

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<http://www.soah.state.tx.us>

Respondent appeared and was represented by Attorney Edward Sillas. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

II. DISCUSSION AND ANALYSIS

A. Background

Respondent's licensed premises are located at 338 S. Wayside Drive, Houston, Harris County, Texas. Respondent holds a mixed beverage permit MB-462671, which includes the Beverage Cartage Permit and Mixed Beverage Late Hours Permit, issued by the TABC on November 29, 1999. The permit has been continuously renewed. Juan A. Vasquez is the owner of the licensed premises.

B. Applicable Law

A holder of a mixed beverage permit or any person employed by the holder who empties a bottle containing distilled spirits must, immediately after emptying the bottle invalidate the identification stamp on the bottle.¹ The invalidation of identification stamps must be done by mutilating the stamp. "Mutilate" means to scratch, cut, tear, or abrade in a manner which inflicts obvious and substantial damage to the stamp but does not totally remove or obliterate the stamp.² No permittee may **knowingly** [emphasis added] 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 "Premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.⁴ The law requires the Commission or administrator to **cancel** [emphasis added], after notice and hearing, the permit of any permittee found by the

¹ § 28.09(a) of the Code.

² § 41.72 of the Rules.

³ § 28.06(c) of the Code.

Commission or administrator to have violated § 28.06 (c) of the Code.⁵ 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 the Rules.⁶

Invoice is defined as an instrument issued by the seller of the alcoholic beverages to a permittee.⁷ An invoice must be issued in original and one copy in consecutively 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. The invoice or a copy of it must be delivered to the permittee and a copy must be kept by the seller making the invoice.⁸ Each invoice must be kept on the licensed premises for a period of two years and must be made available to a representative of the Commission upon reasonable request.⁹

C. Petitioner's Evidence and Arguments

Petitioner contends that Respondent has operated its premises in violation of the Code and TABC's rules. Petitioner alleges that Respondent failed to mutilate the identification stamps on several bottles of distilled spirits and also knowingly possessed uninvoiced bottles of distilled spirits on the licensed premises. Pursuant to § 28.06(c) of the Code, knowingly possessing uninvoiced alcoholic beverages on the premises, regardless of their intended purpose or use, requires the cancellation of Respondent's permits. Petitioner presented ten exhibits and the testimony of TABC Agents Robert Hardcastle and Perry Flores.

1. TABC Agent Robert Hardcastle

Agent Robert Hardcastle is employed by Respondent as an Enforcement Agent. Agent

4 § 11.49(a) of the Code.

5 § 28.06(d) of the Code.

6 § 11.61(b)(2) of the Code.

7 § 41.50(a)(2) of the Rules.

8 § 41.50(h)(1) of the Rules.

Hardcastle testified that he conducted an inspection of Respondent's licensed premises on June 28, 2008, based on a complaint received by the TABC. Upon entering the premises, he first contacted Respondent's owner, Juan A. Vasquez, and inspected the primary bar on the first floor of the establishment. The facility is a two-story building. Agent Hardcastle testified that no violations were observed behind the first floor primary bar.

The scope of the investigation was extended to the patron area on the second floor. A rear staircase was discovered. Agent Hardcastle observed that the staircase led to the kitchen on the first floor and a storage area. In the storage area, Agent Hardcastle observed empty distilled spirit bottles with the tax stamp still intact. He also observed distilled spirit bottles with liquid inside with no tax stamp. There were a total of 13 bottles. Some of the bottles were not packaged and did not have a local distributor's stamp, which was a violation. The uninvoiced distilled spirits included a 750 ml of Scotch, 1.75L of tequila, 1L of Hpnotiq Liqueur, and 1.75 L of rum.

Agent Hardcastle stated that all bottles of distilled spirits are required to have a local distributor's stamp affixed; otherwise, the bottles cannot be shown to have been invoiced to the permittee. Respondent did not have an invoice for the bottles. It is a violation if the bottles do not have local distributor's stamps affixed, especially such a quantity as was found on Respondent's premises. The bottles of liquor were, more than likely, illegally purchased for the licensed premises and, therefore, uninvoiced.

Agent Hardcastle also said the "premises" included the entirety of the building, including any outside buildings and appurtenants. Therefore, the second floor is considered part of the licensed premises.

2. TABC Agent Perry Flores

Agent Flores is employed by TABC as an Enforcement Agent and assisted Agent Hardcastle in the inspection on June 28, 2008. Agent Flores' testimony mirrored that of Agent Hardcastle regarding the floor plan of the premises and the areas inspected. Agent Flores stated that he observed several bottles of alcoholic beverages throughout the area, more specifically, several boxes of Buchanan's Scotch inside several individual boxes. Agent Flores observed several alcoholic beverage bottles not covered by an invoice and several alcoholic beverages bottles without mutilated tax identification stamps, which are violations of the code. Agent Flores observed a total of seven bottles that were empty without mutilated tax identification stamps. The purpose of the stamp is to show that a tax has been paid on the alcoholic beverage. He testified that mutilation is required immediately upon emptying a bottle. Agent Flores opined that the bottles showed recent use. He observed that the uninvoiced bottles had alcoholic beverages inside, and the seals were broken. An administrative notice was issued to the permittee and the alcoholic beverages were seized.

D. Respondent's Evidence and Arguments

Respondent did not present witnesses to testify on its behalf. Respondent contends that the bottles were for personal use and kept separate from the bar's inventory. The public did not have access to the storage room. The manner in which the bottles were kept and the variety of the beverages proved that the bottles were for personal use and private parties.

E. Analysis

The issues in this case are clear. 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.

It was not disputed that the Respondent possessed several uninvoiced alcoholic beverages and

several alcoholic beverage bottles with unmutilated tax stamps on the licensed premises. Respondent's argument that the alcoholic beverages were for personal use and private parties has no merit and does not legally excuse or justify the violation of having knowingly possessed uninvoiced alcoholic beverages and empty alcoholic beverages with tax stamps still intact on the licensed premises regardless of Respondent's intended purpose or use. Respondent's premises include the storage area, even though it was not accessible to the public.

The Code and the rules require the permittee to purchase alcoholic beverages from 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.¹⁰ Respondent knew that the uninvoiced liquors seized on June 28, 2008, were possessed on Respondent's licensed premises in violation of the Code and the rules. Respondent also knew that the premises contained empty alcohol bottles with tax stamps still intact in violation of the Code and the rules. Respondent administrative record showed several violations prior to the June 28, 2008 investigation.

III. 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 and knowing possession of alcoholic beverages without mutilated tax stamps on the licensed premises in violation of § 28.09(a) of the Code are serious and repeated violations. Pursuant to § 28.06(c) of the Code, cancellation is the remedy or sanction for these violations. Staff's recommendation is appropriate based on the severity of the violations. The Administrative Law Judge (ALJ) recommends that Respondent's permit be canceled.

¹⁰ § 41.50(h)(2) of the Rules.

IV. FINDINGS OF FACT

1. Arnold Tijerina & Juan A. Vasquez, d/b/a 'Juanito's 2000 Night Club licensed premises are located at 338 S. Wayside Drive, Houston, Harris County, Texas.
2. Respondent holds mixed beverage permit MB-462671, which includes a Beverage Cartage Permit and Mixed Beverage Late Hours Permit, issued by the TABC on November 29, 1999. The permit has been continuously renewed.
3. On June 28, 2008, Respondent had 13 uninvoiced bottles of alcohol in the license premises with missing tax stamps and tax stamps that were not mutilated.
4. The bottles included Scotch, tequila, Hpnotiq Liqueur, and rum.
5. On that same date, Respondent had on the licensed premises seven bottles of alcohol with tax identification stamps affixed to the bottles there were not mutilated.
6. The seven bottles had Scotch, vodka, and rum in them.
7. Respondent's owner knew that the uninvoiced bottles of distilled spirits and the bottles with unmutilated tax stamps were possessed by Respondent on the licensed premises.
8. On April 3, 2009, 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.
9. The hearing was held on May 1, 2009, in Houston, Harris County, Texas, before Roshunda Pringle, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). Commission Staff appeared and was represented by Ramona Perry, Staff Attorney. Respondent appeared and was represented by Attorney Edward Sillas. After presentation of evidence and argument, the hearing concluded and the record closed on that date.

V. CONCLUSIONS OF LAW

1. Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to Chapter 5 and §§ 6.01, 11.61, 28.06 and 28.09 of the Code, as well as 16 TEX. ADMIN. CODE (TAC) §§ 41.50 and 41.72 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 failed to mutilate the identification stamps on empty bottles of distilled spirits, in violation of § 28.09 of the Code.
5. 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.
6. Respondent's permits should be canceled pursuant to § 28.06(d) of the Code.

SIGNED July 1, 2009.



**ROSHUNDA PRINGLE
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**