

DOCKET NO. 588916

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
THANH MANH DO	§	
D/B/A SMOKEY'S BAR	§	ALCOHOLIC
PERMIT NO(s). MB664651	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-1222)	§	BEVERAGE COMMISSION

ORDER ADOPTING PROPOSAL FOR DECISION

CAME ON FOR CONSIDERATION this 13th day of April 2010, the above-styled and numbered cause.

The hearing in the above matter was conducted by the State Office of Administrative Hearings, Administrative Law Judge Stephen Burger, presiding. The hearing convened on January 22, 2010, and the record was closed on the same date. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on March 22, 2010. The time for filing and ruling on any Exceptions and Replies to the PFD has passed.

The matter is before the Administrator, Texas Alcoholic Beverage Commission for review, consideration and entry of the final agency decision.

It is Ordered that the Findings of Fact and Conclusions of Law made and entered into the Proposal for Decision by the Administrative Law Judge are adopted by the Administrator as the Findings of Fact and Conclusions of Law of the Texas Alcoholic Beverage Commission.

It is further Ordered that the sanctions and penalties found to be warranted by the findings and conclusions of the Administrative Law Judge are adopted by the Administrator as the sanctions and penalties of the Texas Alcoholic Beverage Commission.

IT IS THEREFORE ORDERED that Respondent's permit be **CANCELED FOR CAUSE**.

This is a Final Order of the Commission. The terms of this Order will be enforced without further notice to the Respondent on May 7, 2010, 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 13th day of April, 2010, at
Austin, Texas.

On Behalf of the Administrator,



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

James Epo
ATTORNEY FOR RESPONDENT
7211 Regency Square
Suite 105
Houston, TX 77036
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Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Houston Office

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

MAR 23 2010

**TABC HOUSTON
LEGAL**

March 22, 2010

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

VIA REGULAR MAIL

**RE: Docket No. 458-10-1222; Texas Alcoholic Beverage Commission v. Thanh
Manh Do d/b/a Smokey's Bar**

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, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in cursive script, appearing to read "S. Burger".

Stephen Burger
Administrative Law Judge

SB:rlm
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX
78731- **VIA REGULAR MAIL**
James Epo, Attorney at Law, 7211 Regency Square, Suite 105, Houston, TX 77036 -**VIA REGULAR MAIL**

SOAH DOCKET NO. 458-10-1222

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner**

VS.

**THANH MANH DO
D/B/A SMOKEY'S BAR
PERMIT NO. MB-664651
HARRIS COUNTY, TEXAS
(TABC CASE NO. 588916),
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) requested that the permit of Thanh Manh Do, d/b/a Smokey's Bar, (Respondent) be cancelled because Respondent or his agent, servant, or employee, knowingly possessed or permitted the possession of alcoholic beverages not covered by invoice on August 20, 2009, in violation of the Texas Alcoholic Beverage Code (Code).

The Administrative Law Judge (ALJ) finds that the Staff has proven Respondent committed the alleged violation.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened, and the record closed, on January 22, 2010, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston, Texas, before ALJ Stephen J. Burger. The TABC was represented by attorney Sandra Patton. Respondent appeared through its attorney James Epo.

II. ALLEGATIONS AND LEGAL STANDARDS

Pursuant to the Notice of Hearing, the TABC alleges that on August 20, 2009, Respondent, its agent, servant, or employee, knowingly possessed or permitted the possession of alcoholic beverages not covered by invoice, in violation of the Code §§ 11.61(b)(2) and 28.06(c) and (d).

Additionally, the holder of a mixed beverage permit may purchase liquor from any permittee or licensee authorized to sell liquor for resale. Code § 28.01(c).

III. EVIDENCE, ANALYSIS AND RECOMMENDATION

A. Testimony of witnesses is summarized as follows:

1. Edward Shannon

Edward Shannon, an enforcement agent with Petitioner, stated that on August 20, 2009, he went to Respondent's premises to investigate a complaint of uninvoiced bottles. Mr. Shannon found nine uninvoiced wine bottles on the bar. The wine bottles were mixed in with other bottles, and one of the bottles was open. He spoke with Mr. Do, Respondent, and was told the wine in question was purchased from Sam's Club, and a receipt was produced. Sam's Club is not a permitted distributor. Mr. Shannon admitted that if the wine was used for cooking, there would be no violation.

2. Steven Roskey

Steven Roskey, another agent for the TABC, was also present at Respondent's bar on the date in question. He verified that the wine in question, as well as various beer brands, were purchased by Respondent at Sam's Club. He interviewed Mr. Do, who told him the wine in question was for a family party to be held at the bar. Mr. Roskey stated it was not legal to have a

party at the bar with uninvoiced wine. In his opinion, it is illegal to have uninvoiced alcohol on the bar's premises.

3. Danett Lynch

Danett Lynch has been a cook at Respondent's bar for about three years. She was working on August 20, 2009, when the TABC agents arrived. She observed the wine bottles on the corner of the bar, near the restaurant portion of the bar. She testified that she put the wine bottles there and in fact purchased the wine at Sam's Club, using the bar's credit card. She stated that she bought the wine for her personal use for a party she intended to have for a family event. The party was to be either at the bar or at her home. She also intended to use the wine for cooking purposes at the bar. She stated that Mr. Do did not know she had bought the wine. She has authority to purchase items for the bar, and has made purchases for herself and then paid Mr. Do for her personal purchases. She is not familiar with regulations regarding uninvoiced alcohol.

4. Thanh Do

Thanh Do is the Respondent. His bar serves food as well as alcohol. He testified that he did not know the nine bottles of wine in question were at his bar. He is of Vietnamese descent, has trouble reading English, and does not understand the liquor laws. He does not believe wine is an alcohol.

Mr. Do stated that his cook, Ms. Lynch, had asked if she could have a party at his bar, but she did not ask him if she could buy wine for the party on his account.

Mr. Do employs about six employees and has owned the business for about 3-1/2 years. It is his only business. He was aware of the prior violations, as shown on TABC records.

B. Exhibits

The admitted exhibits show a suspension of Respondent's license for uninvoiced bottles on February 1, 2008; a March 1, 2008 suspension for empty bottles with unmutilated stamps; and a March 1, 2008 written warning for possession of alcohol unfit for consumption.

C. ALJ's Analysis and Recommendation

The evidence shows and the ALJ finds that on August 20, 2009, nine bottles of uninvoiced wine bottles sitting on the bar were observed by TABC agents at Respondent's bar. One of the bottles was open. It is uncontested that these wine bottles were purchased from Sam's Club by Respondent's cook using Respondent's account. Also undisputed is that Sam's Club is not a permitted distributor.

Respondent's cook stated that she uses wine to cook at Respondent's bar, and also stated that the wine was purchased for a party she was having for a family event. Although she stated Respondent did not know she had purchased the wine, she claimed she has authority to purchase items for the bar.

Respondent stated that he did not know the wine in question was at his bar; he has trouble reading English; and he does not fully understand Texas liquor laws. Of course, ignorance of the law does not excuse Respondent. The TABC records indicate that on February 1, 2008, Respondent was cited for possessing uninvoiced alcohol, which should have educated him regarding this particular TABC regulation.

Respondent argues that he did not knowingly possess or permit the possession of the uninvoiced wine at his bar, and therefore did not violate Code §§ 11.61(b)(2), and 28.06(c) and (d). However, those sections state that it is a violation of the cited TABC sections if the Respondent, its agent, servant, or employee, knowingly possesses or permits the possession of uninvoiced wine at Respondent's bar. (Emphasis added). It is undisputed that Danett Lynch is a

cook employed by Respondent, and she admitted buying the wine and bringing it to Respondent's bar. Therefore, Respondent's argument fails.

Respondent also argues that the uninvoiced wine found by the TABC agents on Respondent's bar was bought for Ms. Lynch's personal use and for cooking at the bar, and was not intended to be used or sold at Respondent's bar. However, without further corroboration, the ALJ does not find this argument persuasive. Agent Shannon credibly testified that he found the nine bottles on the bar, mixed in with other bottles, and one of the uninvoiced bottles was open. None were found in the kitchen.

Based on all the evidence, the ALJ finds that the TABC has proven its case by a preponderance of the evidence. The statutes allow for the cancellation of Respondent's permit, rather than a penalty in lieu of suspension. Because Respondent had three prior violations since February 2008, the Staff's requested penalty of the permit's cancellation is appropriate.

IV. FINDINGS OF FACT

1. Thanh M. Do, d/b/a Smokey's Bar, (Respondent) is the holder of a Mixed Beverage Permit, MB664651, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 7818 Almeda Road, Houston, Harris County, Texas 77054.
2. On November 24, 2009, the TABC's Staff sent a Notice of Hearing to Respondent.
3. The November 24, 2009, Notice of Hearing contained a statement of the time, date, location 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 allegations and the relief sought by the TABC.
4. On January 22, 2010, a public hearing was held in Houston, Texas, before Administrative Law Judge Stephen J. Burger. The TABC appeared through its staff attorney Sandra Patton. Respondent appeared through its attorney James Epo. Evidence was presented, and the record closed.
5. On August 20, 2009, Respondent had nine bottles of wine that were purchased at a Sam's Club on its premises, and one of the nine bottles was open.