

DOCKET NO. 591971

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
EL 33 LLC	§	
D/B/A EL 33 CANTINA MERENDERO, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. MB702186, LB & PE	§	
	§	
EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-10-5308)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of August 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Veronica S. Najera presiding. The hearing convened on October 5, 2010 and the SOAH record closed October 20, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on December 13, 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. As of this date no exceptions have been filed.

The Assistant 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 motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent pay a civil penalty in the amount of \$9,000.00 on or before **SEPTEMBER 6, 2011**. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits by the

Code will be **SUSPENDED** beginning at 12:01 A.M. on **SEPTEMBER 14**, 2011, and shall remain suspended for **THIRTY (30)** consecutive days.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$9,000.00** on or before the **TENTH (10th)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18th)** day following the date the judgment is signed and shall remain suspended for **THIRTY (30)** consecutive days

This Order will become final and enforceable on the 5TH day of SEPTEMBER, 2011, unless a Motion for Rehearing is filed **before** that date.

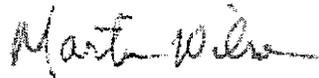
SIGNED this the 10TH day of August, 2011, at Austin, Texas.



Sherry K-Cook, Assistant Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 10TH day of August, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Veronica S. Najera
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
401 East Franklin Avenue, Suite 580
El Paso, Texas 79901
VIA FACSIMILE: (915) 834-5657

El 33 LLC
d/b/a El 33 Cantina Merendero
RESPONDENT
3998 Doniphan Dr.
El Paso, Texas 79932
VIA REGULAR MAIL

Mark T. Davis
ATTORNEY FOR RESPONDENT
1554 Lomaland
El Paso, Texas 79935
VIA REGULAR MAIL
AND VIA FACSIMILE: (915) 629-9691

John W. Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL: john.sedberry@tabc.state.tx.us

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591971 REGISTER NUMBER:

NAME: EL 33 LLC

TRADENAME: EL 33 CANTINA MERENDERO

ADDRESS: 3998 DONIPHAN DRIVE, EL PASO, TEXAS 79932

DUE DATE: 9/6/2011

PERMITS OR LICENSES: MB702186, LB & PE

AMOUNT OF PENALTY: \$9,000

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address

P.O. Box No.

City

State

Zip Code

Area Code/Telephone No.

SOAH DOCKET NO. 458-10-5308

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,

Petitioner

V.

EL 33 LLC d/b/a EL 33 CANTINA
MERENDERO,

Respondent

EL PASO COUNTY, TEXAS
(TABC CASE NO. 591971)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks the cancellation of the alcoholic beverage permit issued to El 33 LLC d/b/a El 33 Cantina Merendero (Respondent) based on the allegation that Petitioner possessed on the licensed premises alcoholic beverages not covered by invoice.

After a review of the evidence of record and applicable law, the Administrative Law Judge (ALJ) recommends a suspension of 30 days of Respondent's permit. In lieu of suspension, Respondent shall pay a civil fine in the amount of \$9,000.00.

I. NOTICE, JURISDICTION, PROCEDURAL HISTORY

There are no contested issues of notice and jurisdiction. Petitioner issued Notice of Hearing alleging a violation of § 28.06 (c) and (d) of the Texas Alcoholic Beverage Code.¹

¹ TEX. ALCO. BEV. CODE ANN. (Code) § 28.06 [Possession of Alcoholic Beverage not Covered by Invoice].

Approved and For the State Office of Administrative Hearings of the Texas Alcoholic Beverage Commission

Subsection (c) of the Code requires the element of knowledge of possession.² At the end of the hearing, Petitioner waived the “knowing” element of the offense.³

The hearing was convened by ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office. Staff was represented by John W. Sedberry, staff attorney. Respondent was represented by Mark T. Davis, attorney. The record closed on October 20, 2010, upon receipt of the transcribed record.

II. BACKGROUND AND EVIDENCE

The listed owner of El 33 Cantina Merendero is Jurgen Ganser. The establishment is located in the city of El Paso, County of El Paso, Texas. The TABC issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in August 2008.⁴

The facts are simple. TABC agents found opened bottles of liquor that were invoiced to another bar owned by Jurgen Ganser during a routine inspection of El 33 Cantina Merendero, on February 22, 2010. In summation, the testimony reveals that the bottles were moved to the bar at issue during a general move of items from another bar that was no longer in existence. Respondent’s employee, Luis Gutierrez, testified he was unaware that they had been moved. He said it was a mistake. He said the bottles were moved in a toilet paper box inadvertently with other boxes. The owner testified he was unaware they were moved until they were discovered in the bar’s storage room by the TABC agents.

There is much testimony of record regarding the who, how, and why the bottles were transported to the storage room at the bar at issue. These facts became of lesser relevancy once the TABC waived the knowledge element of § 28.06(c), because section (a) only requires simple

² Section (c) states “...may knowingly possess or permit to be possessed...”

³ Tr. at pp. 188-89. Mr. Sedberry: Look, your Honor, we would be happy with a 28.06 under subsection A, that’s fine, if we’re going to waive the knowing.

possession of the uninvoiced bottles. At hearing, counsel for the Respondent stated that Respondent does not contest there were bottles from another bar at El 33 Cantina Merendero.⁵ Since Respondent does not contest possession, the only decision for the undersigned ALJ is the penalty to be assessed.

III. DISCUSSION AND ANALYSIS

The ALJ considered the following factors in assessing a penalty for violations of 28.06(a):

1. It is a repeated violation

Respondent has a prior adjudicated violation of § 28.06(a) in October 2009. Three bottles were uninvoiced. Petitioner was given the minimum recommended sanction per schedule of sanctions and penalties under TABC Rules. Petitioner's permit was suspended for eight days. In lieu of suspension, Petitioner paid a civil penalty of \$2,400.00.⁶

2. Large number of uninvoiced bottles

Eleven bottles were found without invoice on February 22, 2010. This is almost four times the amount of bottles found during the October 2009 inspection subject of the first violation of § 28.06(a). The bottles are identified by TABC stamp numbers and make of liquor, as follows:

- No. 49141342/Bols;
- No. 55299475/Blue Caracao;
- No. 55299929/Lucius Melon Dew Schnapps;
- No. 55299518/Lucius Razzmatazz Schnapps;

⁴ Petitioner's Exhibit No. 2, custodian of records affidavit for permit MB-702186.

⁵ Tr. at pp. 8-9.

⁶ Tr. at p. 24. See also Petitioner's Exhibit no. 1, administrative record.

- No. 55299502/Jose Cuervo Tradicional;
- No.49141343/Bols Blue Caracao;
- No. 55299930/DeKuyper Lucius Melon Dew Schnapps;
- No. 55299517.DeKuyper Crème de Cacao;
- No. 49141344/BolsCreme de Cacao;
- No. 49141341/Bols Butterschotch;
- No. 49141220/Bacardi Ron Solrea.⁷

3. The type of violations

Possession of uninvoiced bottles is a major regulatory violation as defined by TABC Rule.⁸

4. Lack of supervision or control

The Code places on the Respondent the duty to manage and control all aspects of the bar's operations. It is apparent from the evidence of record, that the permittee's role was minimal, with regard to the movement of chattel from one bar to another and with the record-keeping. The fact that there were 11 bottles at the bar that went allegedly unnoticed by Respondent may be interpreted as bad management or deliberate ignorance. Both are undesirable conclusions.

Based on the evidence of record and enumerated in this proposal for decision, the ALJ recommends a suspension of 30 days of Respondent's permit. In lieu of suspension, Respondent shall pay a civil fine in the amount of \$9,000.00.⁹

⁷ Tr. at pp. 27-28. See also Petitioner's Exhibit No. 5.

⁸ TABC Rule § 34.3.

⁹ The fine is calculated at \$300.00 per day.

IV. FINDINGS OF FACT

1. A hearing convened on October 5, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus El 33 LLC d/b/a El 33 Cantina Merendero (Respondent).
2. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
3. Staff was represented by John W. Sedberry, staff attorney. Respondent was represented by Mark T. Davis, attorney.
4. The record closed on October 20, 2010.
5. El 33 Cantina Merendero operates under the authority of a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, number MB-702186, issued on August 2008.
6. The bar is situated in El Paso City, County of El Paso, Texas.
7. TABC agents found opened bottles of liquor that were invoiced to another bar owned by Jurgcn Ganser during a routine inspection, on February 22, 2010.
8. The bottles were moved to the bar at issue during a general move of items from another bar that was no longer in existence.
9. Respondent does not contest possession of the uninvoiced bottles.
10. The following 11 uninvoiced bottles were at El 33 Cantina Merendero:
 - No. 49141342/Bols;
 - No. 55299475/Blue Caracao;
 - No. 55299929/Lucius Melon Dew Schnapps;
 - No. 55299518/Lucius Razzmatazz Schnapps;
 - No. 55299502/Jose Cuervo Tradicional;
 - No.49141343/Bols Blue Caracao;
 - No. 55299930/DeKuyper Lucius Melon Dew Schnapps;
 - No. 55299517.DeKuyper Crème de Cacao;
 - No. 49141344/BolsCreme de Cacao;
 - No. 49141341/Bols Butterschotch;
 - No. 49141220/Bacardi Ron Solrea.

11. Respondent has a prior adjudicated violation of § 28.06(a) in October 2009. Three bottles were uninvoiced. Petitioner's permit was suspended for eight days. In lieu of suspension, Petitioner paid a civil penalty of \$2,400.00.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042.
3. Notice of hearing was provided pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.401 and Code § 11.63.
4. Based upon the Findings of Fact, Respondent possessed or permitted to be possessed on the licensed premises 11 alcoholic beverages which were not covered by invoice, in violation of Code § 28.06(a).
5. The ALJ recommends a suspension of 30 days of Respondent's permit no. MB-702186. In lieu of suspension, Respondent shall pay a civil fine in the amount of \$9,000.00.

SIGNED December 13, 2010.



Veronica S. Najera
Administrative Law Judge
State Office of Administrative Hearings