

TABC DOCKET NO. 586141 & 586953

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
GERM INTERNATIONAL, LLC	§	
D/B/A CLUB VENOM,	§	ALCOHOLIC
Respondent	§	
	§	
PERMIT NOS. MB615855, LB	§	
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-11-2833)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 25th day of May, 2012, 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 Catherine C. Egan presiding. The hearing convened on March 21, 2011, was recessed by agreement on that date, and reconvened on June 15, 2011. The SOAH record closed on June 15, 2011. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on July 11, 2011. 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.

With one exception, stated below, 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.

Conclusion of Law No. 4 is modified to read:

TABC's Staff 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 at a time when the consumption of alcoholic beverages is prohibited, in violation of Tex. Alco. Bev. Code §§11.61(b)(22) and 105.06.

On March 21, 2011, ALJ Catherine Egan convened the hearing on the merits at the State Office of Administrative Hearings (SOAH) office in San Antonio, Texas. Staff Attorney Matthew Clark represented the Staff. Respondent's owner and authorized agent, Sam Mized, represented Respondent. The hearing was recessed by agreement shortly after it began and reconvened on June 15, 2011. The hearing concluded and the record closed the same day.

II. DISCUSSION

A. Background and the Parties' Positions

On December 13, 2005, the Commission issued to Respondent a Mixed Beverage Permit, MB-615855 LB, which included a Mixed Beverage Late Hours Permit, for the premises known as Club Venom located at 2407 N. Saint Marys Street, San Antonio, Bexar County, Texas. The permit has been continuously renewed since that time.

Staff claims that Respondent's employees consumed and permitted others to consume alcoholic beverages on the licensed premises during prohibited hours—after 2:15 a.m. and before 7 a.m. on March 21 and June 12, 2009. According to Staff, Respondent's history of administrative violations justifies the imposition of severe sanctions. If both violations are proved, Staff maintains that Respondent's permit should be canceled. Alternatively, if only one violation is established, then Staff requests a 30-day suspension.

Respondent disputes Staff's allegations, and contends that Staff has targeted Club Venom because it caters to the "gay" community. Mr. Mized insists that on June 12, 2009, no one was drinking alcoholic beverages at the club after hours. Instead, he maintains that the TABC agent saw the beer bottles that the employees had cleared from tables as they cleaned the club before closing. Additionally, Mr. Mized argues that because Respondent's employees were trained at a TABC-approved seller training program Respondent is protected from its employees' wrongful acts under the Code § 106.14.

B. Applicable Law

The Code provides that a permit may be canceled or suspended if it is found, after notice and hearing, that the permittee 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.¹ A late hours permit prohibits the consumption of any alcoholic beverage between 2:15 a.m. and 7 a.m. on any day except Sunday. On Sunday, the prohibited hours are between 2:15 a.m. and noon.²

Under certain conditions, the Code affords employers protection from an employee's wrongful conduct if the employer requires its employee to attend a TABC-approved seller training program; ensures that the employee attends the training; and does not directly or indirectly encourage the employee to violate the law. These conditions include conduct that is related to chapter 106 of the Code, which deals with minors, or any provision within the Code related to the sale or delivery to an alcoholic beverage to a person, or to the consumption of alcohol by a person, who is: (1) not a member of a private club on the club premises; (2) a minor; or (3) is intoxicated.³

C. The Evidence**1. The May 21, 2009 Incident**

San Antonio Police Officer Brian Christensen testified that he was on patrol in a marked car on March 21, 2009, at 5:00 a.m., and observed that all of the clubs in the area appeared closed and had empty parking lots except Club Venom. Several cars were still parked in Club Venom's parking lot. Around 5:30 a.m., Officer Christensen drove by Club Venom again. This time he saw Mr. Mizyed standing in the parking lot with a woman. Officer Christensen asked Mr. Mizyed if the bar was opened and if he was the owner. According to Officer Christensen, Mr. Mizyed said that the

¹ The Code § 11.61(b)(22).

² The Code § 105.06.

³ The Code § 106.14..

club was not open and that he was not the owner. Officer Christensen proceeded to enter Club Venom through the unlocked front door.⁴ As soon as he entered the club, Officer Christensen saw three people drinking beer out of beer bottles—each holding a beer bottle. They were either lifting the bottle to their face or were already drinking from the bottle.⁵ All three beer bottles were still cold and were covered with condensation.

Mr. Mizyed entered Club Venom shortly after Officer Christensen. When Officer Christensen asked who was working at the bar, everyone denied working there, including Mr. Mizyed. They told Officer Christensen that the employees had already left the bar. In response, Officer Christensen told them that he was arresting them for burglary. When he began handcuffing them, Mr. Mizyed admitted that he was Respondent's owner and said that the people in the bar were his friends and that Respondent was not selling the beer to them.⁶ The three people consuming beer in the bar were identified as Stephanie Williamson; Frank Simental, and Michael Fahlberg. All three were employed by Respondent.⁷ Officer Christensen agreed that Mr. Mizyed was not in the bar when he arrived, and no one in the club said that management had given them permission to drink alcoholic beverages after hours.

According to Mr. Mizyed, Respondent typically quit serving alcoholic beverages at 2:00 a.m. and asked its customers to leave by 2:15 a.m. The employees took about an hour to clean up the club. Before they left the club for the night, Respondent's employees were supposed to lock-up Club Venom and set the security alarm.⁸

Mr. Mizyed recalled that around 3:30 to 4:00 a.m. on March 21, 2009, he received a telephone call at home from Respondent's security company reporting that Club Venom's security

⁴ Tr. at 26; TABC Ex. 6.

⁵ Tr. at 31.

⁶ Tr. at 27.

⁷ TABC Ex. 6.

⁸ Tr. at 42.

alarms had not been set. Mr. Mizyed explained that he called the bar, but when no one answered, he got dressed and drove to the club with his girlfriend. He arrived at the club around 5:00 a.m. and was talking to his girlfriend in the parking lot when Officer Christensen approached him.

According to Mr. Mizyed, Officer Christensen asked him if he was Club Venom's owner. Believing Officer Christensen to be an officer that he knew, Mr. Mizyed testified that he jokingly denied owning the club.⁹ A couple of minutes after Officer Christensen went into the club, Mr. Mizyed followed. When he entered Club Venom, Mr. Mizyed stated that no one was drinking beer.

Mr. Mizyed acknowledged that the three people in Club Venom that night were Respondent's employees. Ms. Williamson and Mr. Fahlberg were Respondent's bartenders; Mr. Simental was Respondent's door man.¹⁰ He testified that these employees had attended a TABC-approved seller training program and were in the club without his knowledge or his permission. Additionally, he explained that, because Club Venom had already had issues with TABC, the club was very strict with its employees about drinking after hours. Mr. Mizyed insisted that Respondent had taken proper precautions to ensure none of its employees consumed alcohol during prohibited hours and asserted that the three employees were terminated shortly after this incident.

2. The June 12, 2009 Incident

On June 12, 2009, at 3:16 a.m., TABC agents Tilita Harris and Nina Gonzales conducted a follow-up visit to Club Venom to find out if alcoholic beverages were being served during prohibited hours.¹¹ When the agents knocked on Club Venom's front door and identified themselves as TABC agents, no one answered. They then knocked on one of the front windows, but still no one answered. Agent Harris testified that she noticed a gap between the aluminum blind and the window where the

⁹ Tr. at 43.

¹⁰ Tr. at 46.

¹¹ Tr. at 54-55; TABC Ex. 7.

blind was not flush with the window. When she looked through this gap, she reported that she was able to see the right side of the bar area.¹² Agent Harris testified that she reported what she saw to Agent Gonzales, who was standing behind her. Agent Gonzales wrote down what Agent Harris told her, but testified that she never looked through the gap because the space was too small.

Peering through the window gap, Agent Harris said that she saw a man sitting at the bar, later identified as Kyle Dresser, who was drinking from a beer bottle. She acknowledged that she could not read the label on the bottle.¹³ Mr. Dresser then sat the beer bottle on the bar counter and began talking to someone to the side of him. Agent Harris clarified that she could not see that person because of her limited view. Additionally, Agent Harris testified that she saw two female bartenders working behind the bar. One bartender picked up two tip jars and moved them behind the bar and then picked up a beer bottle and drank from it. The bartender was Ms. Williamson.

At this point, Agents Harris and Gonzales again knocked on the front door and identified themselves. When no one responded, Agent Harris knocked on the window and looked through the gap again. Agent Harris saw Mr. Mizyed approach the front door while one of the bartenders picked up the three beer bottles from the bar counter. According to her report, Agent Harris she saw the bartender “place then (sic) on the side of the entrance to the back of the bar.”¹⁴ Both Agents Harris and Gonzales reported that it took Mr. Mizyed an inordinate amount of time to open the door. According to Agent Harris, she and Agent Gonzales knocked on the door and demanded that they open the door three or four times, and she could hear Mr. Mizyed fumbling with keys before he opened the door.¹⁵

By the time they entered Club Venom, Agent Harris agreed that the bar was clear of beer bottles and no one was consuming an alcoholic beverage. Four people were inside the club:

¹² Tr. at 68.

¹³ Tr. at 58.

¹⁴ TABC Ex. 7.

¹⁵ Tr. at 59-60.

Mr. Mizyed; Ms. Williamson, the bartender; Mr. Dresser; and Lindsay Lane, another bartender. Agent Harris explained that because she had seen the bartender move the beer bottles to the side of the bar, she immediately went to that location and found a little trash can with three cold beer bottles. She did not check the other garbage cans.¹⁶ Agent Gonzales testified that she did not see the beer bottles in the trash can.

The agents asked everyone for their identification. Everyone complied except Mr. Mizyed, according to Agent Harris. He refused, stating that she already knew who he was and that TABC was harassing him and trying to close Club Venom because they did not like “gay” people. Agent Harris placed Mr. Mizyed under arrest and handcuffed him because he was being uncooperative.¹⁷

Under cross-examination, Agent Harris acknowledged that Lindsay Lane was a transvestite, but because she was biologically a man, Agent Harris referred to Lindsay Lane using masculine pronouns.¹⁸ Agent Harris also agreed that she had been to Club Venom numerous times in her 15 years as a TABC agent, but she denied that Respondent was being harassed or targeted. As for why neither agent asked Ms. Williamson if she was TABC seller certified, Agent Harris explained that it was irrelevant to the violation of permitting the consumption of alcoholic beverages during prohibited hours.

Mr. Mizyed emphatically denied that anyone was drinking an alcoholic beverage in the club when the TABC agents arrived. Instead, he explained that the employees were just finishing clearing the bar and cleaning up before closing. Mr. Mizyed challenged Agent Harris’ ability to clearly observe anything through the crack between the blind and the window because the crack is so small. Additionally, he testified that there were several trash cans by the little trash can with hundreds of bottles in them. According to Mr. Mizyed, TABC agents came to Club Venom once or twice a week

¹⁶ Tr. at 67.

¹⁷ Tr. at 60.

¹⁸ Tr. at 65 and 77.

for three months to harass him and his staff in the hopes of closing the club. In his opinion, Agent Harris wanted to find that Club Venom was permitting the consumption of alcoholic beverages after hours so she could shut the club down. After Ms. Harris left the region, Mr. Mizyed noted that Respondent was not cited for this type of infraction again.

Mr. Mizyed called Agent Gonzales to testify at the hearing. According to Agent Gonzales, she did not see anyone drinking beer at Club Venom that night. Additionally, she could not recall if anyone from TABC looked in any of the other garbage cans for beers at the bar aside from the one Agent Harris reported finding just three bottles of beer. Agent Gonzales also agreed that she did not see anyone in the bar move beer bottles off the bar because the bar counter was clean when she entered.¹⁹

3. Respondent's History of Administrative Violations

Respondent has been continuously permitted since it was initially permitted by TABC on December 13, 2005. Aside from the alleged violations that are the subject of this contested case, the following is a summary of Respondent's administrative violations:

October 10, 2006	A written warning ²⁰
October 30, 2008	Two written warnings
November 8, 2008	Suspension—permitting the consumption of alcohol during prohibited hours (after NOH)
March 4, 2009	Two written warnings, one of which was for permitting the consumption of alcoholic beverages during prohibited hours
January 29, 2010	Suspension for sale while under suspension
May 20, 2010	Four written warnings
July 1, 2010	Four written warnings

¹⁹ Tr. at 88.

²⁰ Only the written warnings that were issued for permitting the consumption of alcoholic beverages during prohibited hours are detailed. The violations dealing with the consumption of alcoholic beverages during prohibited hours are also bolded.

Respondent asserted that these are old offenses and that Club Venom has had no recent problems with serving alcoholic beverages during prohibited hours. Mr. Mizyed testified that this location used to have drug problems, but after he took over the bar, the drug problems disappeared.²¹ He also noted that this is a small business and that TABC has already closed it down for an extended period—a period he asserted was much longer than that recommended by the ALJ.²² Respondent requests that, due to the time that has lapsed since the alleged violations, the antagonistic relationship the agents who issued these charges had with him, his staff, and the customers Club Venom serves, and its history since these agents no longer monitor this region, and specifically Club Venom, that its license not be canceled and that it be permitted to continue to operate.

D. ALJ's Analysis

The first issue to address is whether Respondent permitted the consumption of alcoholic beverages during prohibited hours on March 21 and June 12, 2009. If so, two additional issues arise: (1) whether the training of Respondent's employees at a TABC-approved server training program insulated Respondent from responsibility for these violations under the Code § 106.14; and if not, (2) whether cancellation or suspension is the appropriate sanction.

1. Consumption of Alcohol During Prohibited Hours

Respondent presented little controverting evidence to refute Officer Christensen's testimony that on March 21, 2009, Respondent's employees were consuming alcoholic beverages during prohibited hours. Although Mr. Mizyed argued that TABC and the police were harassing Respondent because of its customers, he presented no credible evidence to support this claim. Officer Christensen's testimony was credible and established that on March 21, 2009, Respondent employees consumed alcoholic beverages in Club Venom during prohibited hours.

²¹ Tr. at 99.

²² Tr. at 101.

The next incident occurred on June 12, 2009, and is more difficult to evaluate because the testimonies of Mr. Mizyed and Agent Harris conflict. Agent Harris testified that through a small gap between the window and the blind, she saw Mr. Dressler and a female bartender drink from bottles on the bar. Although she could not read the labels on the bottles, she testified that she believed them to be beer bottles. This was confirmed in her opinion when she found three cold beer bottles in a little trash can by the bar.

Mr. Mizyed, who was inside the bar, insisted no one was drinking beer when the agents arrived. Instead, he maintains that the employees were clearing the tables and cleaning the bar when the agents arrived. Mr. Mizyed again opined that Agent Harris was targeting Club Venom because of the customers it served, but he presented no credible evidence to support this accusation.

Several details create doubt about what happened June 12, 2009. First, the agents arrived an hour after the prohibited hours began. It is reasonable to assume that Respondent's employees were still in the club after it closed, as Mr. Mizyed testified. Next, Agent Harris was only able to see through a small gap between the window and the blind and admitted that from where she was standing she could not read the labels on the bottles. Agent Gonzales did not look through the gap to see if she could read the labels or to verify that the bottles were beer bottles. Once inside the club, Agent Harris went to the area where she thought the bartender put the bottles and found three cold beer bottles in a little trash can, but she admitted she did not actually see where the bartender put the bottles when they were removed from the bar. Because it had only been an hour since closing, nothing in evidence indicates that beer bottles opened shortly before closing would have been warm. Again, Agent Gonzales did not see the beer bottles in the trash.

Staff had the burden of proof in this matter. The ALJ believes that Agent Harris thought the bottles on the bar were beer bottles, but without her being able to read or recognize the labels the evidence does not prove that they were beer bottles. Similarly, Agent Harris was confident that she went to the area where the bartender deposited the bottles that had been removed from the bar, but Agent Harris admitted she did not actually see where the bartender put the bottles. Additionally, she did not check to see if other bottles in the trash were still cold. Equally compelling, Agent Gonzales

did not see anyone consume beer in Club Venom. Based on all the evidence, the ALJ finds that Staff did not meet its burden of proof to show that on June 12, 2009, Respondent's employees consumed or permitted the consumption of alcoholic beverages in Club Venom during prohibited hours.

2. The Applicability of the Code § 106.14

Mr. Mizyed maintained that he is not responsible for his employees' conduct on March 21, 2009, because he was unaware that his employees had remained in Club Venom drinking beer during prohibited hours and because they did not have his permission to do so. He argues that Section 106.14 protects Respondent against its employees' conduct when they consume alcoholic beverages during prohibited hours. Staff disagrees and asserts that Section 106.14 does not apply to this type of violation.

The protection afforded an employer under the Code §106.14 applies only if the server employee sales or delivers an alcoholic beverage to: (1) someone at a private club who is not a member; (2) a minor; or (3) to someone who is intoxicated. These conditions are not applicable in this case.

Additionally, Section 106.14 requires that the employer not directly or indirectly encourage the employee to violate the Code. Before March 21, 2009, Respondent had received a suspension and a written warning for permitting the consumption of alcoholic beverages during prohibited hours. Respondent was on notice that its staff had violated the prohibition against consuming alcohol after hours and was obligated to ensure it did not happen again. Respondent failed to do so. Respondent offered no credible evidence that any procedures or protocols were in place to ensure alcoholic beverages were not served during prohibited hours. While Respondent may not directly have encouraged its employees to violate the law, Respondent's indifference in setting up procedures to ensure that alcoholic beverages were not served or consumed during prohibited hours was tantamount to indirectly encouraging its employees to violate this law. Therefore, Respondent is not entitled to the benefits provided employers under the Code § 106.14.

3. Sanctions

The final issue to consider is what sanction is appropriate for the March 21, 2009 violation given Respondent's past history of violations. Staff requested that Respondent's permit be suspended for 30 days if only one violation was proven. TABC rules contain a penalty chart found at 16 TEX. ADMIN. CODE § 34.3. For a second violation of serving or consuming alcoholic beverages during prohibited hours, the penalty chart recommends a 10-14 day suspension or \$300 per day. As noted above, prior to March 21, 2009, Respondent's permit was suspended for ten days for permitting the consumption of alcoholic beverages during prohibited hours. Respondent was also issued a written warning for this offense again on March 4, 2009—less than three weeks before this incident.

Respondent's history indicates that Respondent did not take this infraction of the Code seriously. Moreover, despite Mr. Mizyed's testimony that he terminated the employees who were consuming beer in the club after hours on March 21, 2009, Ms. Williamson was still working for Respondent on June 12, 2009. Based on Respondent's administrative violations history for permitting the consumption of alcoholic beverages and for violating this statutory provision again on March 21, 2009, the ALJ agrees with Staff that a severe sanction is warranted, but can find no justification for a 30-day suspension since this is only the second "after hours consumption" violation for which a penalty is to be imposed. Therefore, the ALJ recommends that the maximum suspension for a second violation of the Code § 11.61(b)(22) or § 105.06, a 14-day suspension, is warranted.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued to Germ International LLC d/b/a/ Club Venom (Respondent) Mixed Beverage Permit, MB-615855 LB, which includes a Mixed Beverage Late Hours Permit, for the licensed premises located at 2407 N. Saint Mary's Street, San Antonio, Texas 78212 (Club Venom/the licensed premises). This permit was in effect at all times relevant to this proceeding.

2. On March 21, 2009, at 5:00 a.m., Respondent's employees consumed alcoholic beverages on the license premises.
3. Respondent's history of administrative violations includes the following:

October 10, 2006	A written warning
October 30, 2008	Two written warnings
November 8, 2008	Suspension—permitting the consumption of alcohol during prohibited hours (after NOH)
March 4, 2009	Two written warnings, one of which was for permitting the consumption of alcoholic beverages during prohibited hours
January 29, 2010	Suspension for sale while under suspension
May 20, 2010	Four written warnings
July 1, 2010	Four written warnings

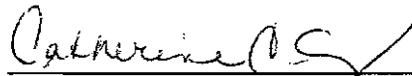
4. On February 18, 2011, the Staff sent a notice of hearing to Respondent stating that a hearing would be held on this matter on March 9, 2011, at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas.
5. The Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; stated 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 March 9, 2011, the evidentiary hearing convened in San Antonio, Texas, before ALJ Catherine Egan. Staff Attorney Matthew Clark represented the Staff. Respondent's owner, Mr. Mized, appeared on behalf of Respondent. By agreement of the parties, the hearing was recessed to allow Staff to amend its notice of hearing. The hearing reconvened on June 15, 2011, in the SOAH hearing rooms in San Antonio, Texas, with both parties present. At the conclusion of the hearing that day, the record closed.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 11.61(b)(22).

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 ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.501.
4. TABC's Staff 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 ANN. § 105.06.
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit, MB 615855 LB, should be suspended for 14 days. In the alternative, Respondent should be given the opportunity to pay a penalty of \$300 per day in lieu of suspension.

SIGNED July 11, 2011.



**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**