

**DOCKET NOS. 619358, 619351, 623455, 623456, 623457, 623458, 623459, 623471, 623670,
623671, 623672**

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
G CABARET MANAGEMENT CORPORATION D/B/A G CABARET, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT MB755216, LB	§	
	§	
	§	
HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-14-1793)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of April, 2015, 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 Stephen Burger presiding. The hearing convened on July 18, 2014 and the SOAH record closed on that same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 12, 2014. 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.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision and incorporate 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 Fact 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 the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on June 3, 2015** and shall remain suspended for **TWELVE (12) CONSECUTIVE DAYS, UNLESS** a civil penalty in the amount of **\$3,600.00 is paid ON OR BEFORE May 26, 2015.**

This Order will become final and enforceable on the 16th day of May, 2015, unless a Motion for Rehearing is filed by the 15th day of May, 2015.

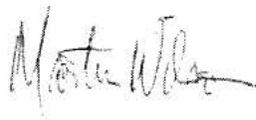
SIGNED this the 22nd day of April, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
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 22nd day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Stephen Burger
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (512) 322-2061

G Cabaret Management Corporation
d/b/a G Cabaret
RESPONDENT
9009 Airport Boulevard
Houston , TX 77061
VIA FIRST CLASS MAIL, CMRRR # 70120470000133035213

Clyde W. Burleson
ATTORNEY FOR RESPONDENT
1533 W. Alabama, Suite 100
Houston, Texas 77006
VIA FIRST CLASS MAIL, CMRRR# 70120470000133035206
AND
VIA FACSIMILE: (713) 526-3787

Sandra K. Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: sandra.patton@tabc.texas.gov

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 619358, 619351, 623455, 623456, 623457, 623458, 623459, 623471,
623670, 623671, 623672 **REGISTER NUMBER:**

NAME: G Cabaret Management Corporation

TRADENAME: G Cabaret

ADDRESS: 9009 Airport Boulevard, Houston, Texas

DUE DATE: May 26, 2015

PERMITS OR LICENSES: MB755216, LB

AMOUNT OF PENALTY: \$3,600.00

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

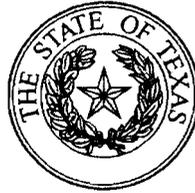
State

Zip Code

Area Code/Telephone No.

State Office of Administrative Hearings

619358



RECEIVED

SEP 12 2014

HOUSTON
LEGAL

Cathleen Parsley
Chief Administrative Law Judge

September 12, 2014

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

RE: SOAH Docket No. 458-14-1793; Texas Alcoholic Beverage Commission vs. G Cabaret Management Corporation d/b/a G Cabaret (TABC Case Nos. 619358, 619351, 623455, 623456, 623457, 623458, 623459, 623471, 623670, 623671, & 623672)

Dear Ms. Cook:

Please find enclosed a Proposal for Decision in this case. It contains my recommendations and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A handwritten signature in black ink that reads "S. Burger".

Stephen Burger
Administrative Law Judge

SB/cj

Enclosure

xc Sandra Patton, Texas Alcoholic Beverage Commission, 427 W. 20th Street, Suite 600, Houston, TX 77008
- VIA REGULAR MAIL

Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL

Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL

Clyde Bursleson, Bursleson & Craig, P.L.L.C., 1533 W. Alabama, Ste. 100, Houston, TX 77006 - VIA REGULAR MAIL

SOAH DOCKET NO. 458-14-1793

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
	§	
	§	
v.	§	
	§	
G CABARET MANAGEMENT CORPORATION	§	OF
D/B/A G CABARET	§	
PERMIT NO(s). MB755216, LB	§	
Respondent	§	
	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NOS. 619358, 619351,	§	
623455, 623456, 623457, 623458, 623459,	§	
623471, 623670, 623671, 623672)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff/Commission) brought this action against G. Cabaret Management Corporation d/b/a G Cabaret (Respondent) alleging that Respondent, by its permittee, agent, servant, or employee, gave checks for the purchase of beer that were dishonored; failed to timely pay for liquor from a dealer (commonly referred to as “cash law” or “credit law” violations) numbering ten incidents;¹ and provided documents to the Commission that contained false, inaccurate or misleading information in violation of the Texas Alcoholic Beverage Code (Code).²

The Administrative Law Judge (ALJ) finds that Staff has proven Code violations for four of the ten incidents but has not proven the allegation that Respondent provided documents containing false information to the Commission.

¹ “Incident” is defined as one financial transaction or instrument made by a retailer that fails to provide payment in full for beer delivered to the retailer. 16 Tex. Admin. Code (TAC) § 45.131(4).

² Tex. Alco. Bev. Code (Code) § 11.61(b)(2) and (b)(7).

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. On July 18, 2014, a public hearing was convened by ALJ Stephen J. Burger with the State Office of Administrative Hearings (SOAH), in Houston, Texas. Staff was represented by Sandra Patton, Attorney. Respondent was represented by Attorney Clyde Burlison. The record closed at the conclusion of the hearing.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may suspend for not more than 60 days, or cancel an original or renewal permit if it is found, after notice and hearing, that the licensee gave a check as payment for beer which was dishonored when presented for payment.³ A cash payment is required for the purchase of beer for licensees or permittees, and no person may make a sale except for cash on or before delivery to the purchaser.⁴

For failing to timely pay for liquor purchases (“credit law” violations) the Commission may, after notice and hearing, suspend the license or permit for not more than 60 days or cancel a permit.⁵

Staff has the burden of proof by a preponderance of the evidence.⁶

III. EVIDENCE

A. Staff’s Evidence

1. Nicole Phillips

³ Code § 61.73(b) and 16 TAC § 45.131.

⁴ Code § 102.31.

⁵ Code § 11.61(b); § 102.32 and 16 TAC § 45.121.

⁶ 16 TAC § 745.8831 *et seq.*

Nicole Phillips, an Investigations Auditor for the Commission, testified that beginning in July 23, 2013, she met several times with Christina Alvarez, President and owner of Respondent, to discuss cash and credit law violations and explore possible settlement. Ms. Alvarez informed Ms. Phillips that the violations were a result of bank errors, and during the course of the meetings, she provided Ms. Phillips with three letters from Rosa Flores, a manager of Respondent's bank, Comerica Bank. The letters were dated January 11, 2013, April 19, 2013, and June 14, 2013, and generally explained that Respondent's "returned checks" were due to posting holds or overdraft errors by the bank.

The Commission received information from an investigator for Comerica Bank that the letters from Ms. Alvarez were fraudulent, the bank was not in error, and there were no funds in Respondent's bank account when the checks were presented.⁷ The Commission then made a determination that it could cancel Respondent's permit because the Respondent knew that several checks given to distributors had "bounced."

2. Denise Owens

Denise Owens is a Fraud Investigator for Comerica Bank. She was contacted by the Commission because Ms. Phillips was having difficulty contacting the Respondent's local bank manager, Ms. Flores, regarding the returned checks. Ms. Owens' investigation revealed that the three letters from Ms. Flores regarding the returned checks of Respondent were inaccurate and misleading. Ms. Owens testified that her investigation showed that Respondent had insufficient funds to cover the checks in question, and both Respondent and the payees were notified at the time. Ms. Owens admitted that Ms. Flores, as a manager, could pay checks with insufficient funds and charge the customer, and such a procedure was called a "force-pay." Ms. Owens also admitted that Ms. Flores had the authority to write the letters explaining Respondent's insufficient funds (NSF) checks.

Ms. Owens stated that Ms. Flores explained to her that Ms. Flores felt "pressured" by Respondent, and Ms. Flores just wanted to get them "off her back." However, Ms. Owens

⁷ Ms. Phillips also testified that Ms. Flores resigned from Comerica Bank, but she did not know the date.

testified that she found no evidence of any personal relationships between Respondent's owners and Ms. Flores or any evidence of any "kickbacks" between the parties.

3. Documentary Evidence

The relevant documentary evidence presented by Staff includes the three letters from Ms. Flores addressed "To Whom it may concern." The first letter, dated January 11, 2013, states that Respondent's returned checks from October 2012 to December 2012 resulted because of the bank's failed "attempts to link [Respondent's] overdraft coverage, and this has caused numerous checks to return NSF."

The second letter from Ms. Flores dated April 19, 2013, states that a check was returned on Friday, April 12, 2013, due to a "deposit hold that should have been removed," and that it and another draft were returned in error.

The third letter from Ms. Flores dated June 14, 2013, listed 16 checks that were returned because of insufficient funds. The reason given was that "due to Comerica's posting system, several checks were returned even though the client had several credit card deposits that [posted] immediately after [the checks were processed]. Our way of clearing items is unusual and we manually go in and pay items that have any direct deposit or ACH credits, including credit card payments."

Petitioner submitted documents showing NSF checks for beer purchases on the following dates: December 6, 2012; December 18, 2012; February 21, 2013; March 12, 2013; April 11, 2013; August 19, 2013; December 2, 2013; and January 30, 2014. These were the only cash law violations listed in the notice of hearing. The check dated December 2, 2013, was to Ralston Wholesale Liquor for \$570.28; and the check dated January 30, 2014, was also to Ralston Wholesale Liquor for \$962.95.

Petitioner also submitted documents showing that on two occasions Respondent failed to pay for liquor purchases in a timely manner. The two missed payments were to

Ralston Wholesale Liquor; one was for \$430.00 due on July 10, 2013; and another was for \$1,540.37 due on June 25, 2013.

B. Respondent's Evidence

1. Gustavo Alvarez

Gustavo Alvarez is the husband of the owner of Respondent and helps manage the bar. He testified that sometimes Respondent's checks would be presented to the bank right before deposits were made. Ms. Flores could force-pay checks, treating them as overdrafts. Mr. Alvarez testified that he considered Ms. Flores to be Respondent's "overdraft protection." He stated Ms. Flores looked out for these instances, and he would take care of paying the overdrafts when he was notified. He trusted and relied upon Ms. Flores in these matters. Ms. Flores explained to him that every morning she reviewed a list of NSF checks from the previous day. She then called the payor customer and attempted to resolve the deficiency. Ms. Flores told him that sometimes, due to time constraints, she did not get to the list timely. Ms. Flores also informed him that there was an occasional "glitch" in the bank's system that although funds were in Respondent's account, they were not available until the next day.

Mr. Alvarez also testified he never harassed Ms. Flores, nor did he have any social relationship with her.

2. Christina Alvarez

Christina Alvarez is the owner and president of Respondent. She testified that Ms. Flores would contact her or her husband and tell them to make a deposit to clear a check. Ms. Flores also informed Ms. Alvarez that funds from credit card sales would be late due to a bank error. Ms. Alvarez testified that Ms. Flores sometimes did not "catch" the NSF checks. Ms. Alvarez stated that "late 2013" was the last time a check from her bar was returned NSF, and she has since paid cash for alcohol purchases.

Ms. Alvarez testified that she requested from Ms. Flores the three letters referenced above to show to the Commission, and that she has never socialized with Ms. Flores.

IV. ANALYSIS

Staff argues that the checks returned for insufficient funds were not a result of a bank error, and that the letters from the bank manager Ms. Flores, explaining Respondent's NSF checks constituted false information to the Commission. Respondent argues that it is not disputing that the checks "bounced," but rather the NSF checks were caused by a bank error. They also argued that they relied on the bank manager to notify them about any bounced checks and to handle the matter by force-paying the checks.

There is no question that Ms. Flores had authority to force-pay checks, as admitted to by the bank investigator. The Alvarezes relied upon Ms. Flores to contact them about NSF checks and according to her statements in the three letters she clearly insinuated that bank errors were the cause of the NSF checks.⁸ For example, in the January 11, 2013, letter, she stated "[W]e had several failed attempts to link their overdraft coverage, and this has caused numerous checks to return NSF." The following two letters issued by Ms. Flores referenced above contain additional reasons for the Respondent's NSF checks.

According to the bank investigator, while Ms. Flores may have been inaccurate and misleading, Ms. Flores nevertheless had the authority to force-pay NSF checks. Ms. Flores also had the authority to issue the letters explaining the NSF checks, as the bank investigator admitted. The Alvarezes relied upon Ms. Flores to contact them regarding NSF checks and to force-pay the checks, which apparently was done for several NSF checks from August 2012 to about August 2013. The Department's records, as cited above, show numerous cash law incidents from December 6, 2012, to August 2013. This shows a pattern supporting Respondent's position as to the manner Ms. Flores was handling its NSF checks, and also demonstrates Respondent's reliance on Ms. Flores.

⁸ Although neither party referred to it, 16 TAC § 45.131(f)(1)(C)(i), relating to cash law incidents, and 16 TAC § 45.121(h)(1)(C)(i) relating to credit law incidents, state that such violations may be disputed by written statements that the NSF checks were due to a bank error.

Because there is sufficient evidence Ms. Flores provided information that bank error was the cause of the returned checks, the ALJ finds that all incidents of returned checks (cash law incidents) prior to Ms. Flores leaving the bank were not cash law *violations*. Although there is no evidence of the exact date she resigned from the bank, her September 19, 2013 affidavit provides a clue that she was not employed past that date.⁹ Therefore, the ALJ makes a reasonable inference that September 19, 2013, was her resignation date, and the last time the Respondent could rely on her method of handling its NSF checks.

The record also shows that there were two cash law violation incidents after September 19, 2013: One on December 2, 2013, and another on January 30, 2014. The Alvarezes knew or should have known after September 19, 2013, that they could no longer rely on Ms. Flores to act as their personal overdraft officer at the bank. Therefore, Staff has proven two cash law violations.

Additionally, the Respondent did not produce any evidence refuting Staff's evidence that they did not *timely pay* the July 2, 2013, and July 17, 2013, *credit law* violations. Staff proved those violations by producing the credit law affidavit from the wholesaler. These two incidents are not based on NSF checks. Therefore, combined with the cash law violations, there are a total of four cash/credit law violations by Respondent.

Based on the testimony of the Alvarezes and the affidavit of Ms. Flores dated September 19, 2013, there were no kick-backs from the Alvarezes to Ms. Flores, although the evidence suggests Ms. Flores felt pressured by the Alvarezes to help them. Because the three letters from Ms. Flores were sent by an authorized bank official, there is insufficient evidence that *Respondent* provided documents to the Commission containing false or misleading information in violation of Code § 11.61(b)(2) or (b)(7).

V. RECOMMENDATION

Staff had initially requested a 60-day suspension or \$300.00 per day penalty, or

⁹ The ALJ also notes Ms. Phillips, the TABC investigator, testified Ms. Flores resigned.

cancellation of Respondent's permit should it prevail on all allegations. Pursuant to 16 TAC § 34.3, a third cash/credit law violation may be subject to a 12- to 30-day suspension, or a penalty of \$300.00 per day. The ALJ recommends a 12-day suspension based on the four violations. The ALJ notes there is no evidence of cash/credit law violations by Respondent since January, 2014.

VI. FINDINGS OF FACT

1. G Cabaret Management Corporation d/b/a G Cabaret (Respondent) holds a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit for the premises located at 9009 Airport Boulevard, Houston, Harris Co., Texas.
2. From December 6, 2012, to July 2013, Respondent had six incidents when it gave a check that was dishonored when presented for payment (cash law violations).
3. From December 6, 2012, to July, 2013, Respondent relied upon Rosa Flores, Manager of Comerica Bank, to notify it of any checks returned for insufficient funds (NSF), allowing Respondent to deposit additional funds into its account or force-paying the checks.
4. On January 11, 2013, April 19, 2013, and June 14, 2013, Ms. Flores issued letters that were received by the Texas Alcoholic Beverage Commission (Commission) stating reasons why the bank was responsible for Respondent's dishonored checks.
5. The six incidents of NSF checks by Respondent from December 6, 2012, to July 2013 were due to a mistake documented by Respondent's bank, Comerica Bank, pursuant to Ms. Flores letters dated January 11, 2013, April 19, 2013, and June 14, 2013.
6. Ms. Flores had the authority to issue the January 11, 2013, April 19, 2013, and June 14, 2013 letters.
7. On or about September 19, 2013, Ms. Flores was no longer employed by Comerica Bank.
8. After Ms. Flores left Comerica Bank on or about September 19, 2013, Respondent knew or should have known it could no longer rely on Ms. Flores to force-pay or otherwise dispense with any future NSF checks.
9. Respondent gave a check to Ralston Wholesale Liquor on December 2, 2013, in the amount of \$570.28 that was returned for insufficient funds (NSF).
10. Respondent gave a check to Ralston Wholesale Liquor on January 30, 2014, in the amount of \$962.95 that was returned NSF.

11. Respondent failed to timely pay \$1,540.37 for liquor purchases from Ralston Wholesale Liquor on June 25, 2013.
12. Respondent failed to timely pay \$430.00 for liquor purchases from Ralston Wholesale Liquor on July 10, 2013.

VII. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code (Code) Ch. 5 and § 11.61.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing Findings of Fact and Conclusions of Law pursuant to Code § 5.43 and Tex. Gov't Code Ch. 2003.
3. Proper and timely notice of the hearing was given to all parties pursuant to the Tex. Gov't Code §§ 2001.051-.052.
4. On December 2, 2013, and January 30, 2013, Respondent gave checks for the purchase of beer that were dishonored when presented for payment in violation of Code §§ 61.73, 102.31, and 16 Tex. Admin. Code (TAC) § 45.131.
5. On June 25, 2013, and July 10, 2013, Respondent failed to timely pay for liquor purchased from a wholesale dealer in violation of Code § 11.61(b)(2), 102.32, and 16 TAC § 45.131.
6. Based on the violations in Conclusions of Law 4 and 5, a 12-day suspension of Respondent's permit is warranted. 16 TAC § 34.3; Code §§ 11.61 and 61.73.
7. Pursuant to Code § 11.64 and 16 TAC § 34.3, Respondent should be allowed to pay a \$300.00 per day fine in lieu of suspension of its permit.

SIGNED September 12, 2014.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS