

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

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LEGAL

October 6, 2015

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

VIA REGULAR MAIL

RE: SOAH Docket No. 458-15-4394 Texas Alcoholic Beverage Commission vs. Test Kitchen LLC. d/b/a Cork Food & Wine

Dear Ms. Cook:

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

Sincerely,

A handwritten signature in cursive script that reads "Brenda Coleman".

Brenda Coleman
Administrative Law Judge

BC/me
Enclosure

Xc: Sheila Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, Texas 78731-VIA REGULAR MAIL
Test Kitchen LLC. d/b/a Cork Food and Wine, 5709 Palo Pinto, Tyler, Texas 75707-VIA REGULAR MAIL

DOCKET NO. 458-15-4394

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§ § § § § § § § § § §	BEFORE THE STATE OFFICE
v.		
TEST KITCHEN LLC D/B/A CORK FOOD & WINE, Respondent		OF
(TABC CASE NO. 628532)		ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) Staff (Staff) brought this action against Test Kitchen LLC, d/b/a Cork Food & Wine (Respondent) alleging that sales of alcoholic beverages constituted more than 50 percent of Respondent’s gross receipts and that renewal of Respondent’s Mixed Beverage Restaurant Permit with Food and Beverage certificate and Beverage Cartage Permit should, therefore, be denied. The Administrative Law Judge (ALJ) recommends that the renewal application be denied.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On August 10, 2015, a hearing was held before ALJ Brenda Coleman at the State Office of Administrative Hearings (SOAH) in Dallas, Texas. Staff was represented by Shelia A. Lindsey, attorney. Respondent was represented by its authorized agent Jon Florendo. The record closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The holder of a mixed beverage permit may be issued a food and beverage certificate by the Commission if the gross receipts of mixed beverages sold by the holder are 50 percent or less of the total gross receipts of the premises.¹ Upon receipt of an application for the renewal of a mixed beverage permit by a holder who also holds a food and beverage certificate, the Commission shall request certification by the Texas Comptroller of Public Accounts (Comptroller) to determine whether the permit holder is in compliance with the requirement that the gross receipts of mixed beverages are 50 percent or less of the total gross receipts of the premises. If the Comptroller does not certify that the holder is in compliance, the Commission may not renew the certificate.² The Commission may cancel a renewal permit if the permittee violates a provision of the Texas Alcoholic Beverage Code (Code) or a rule of the Commission.³

III. EVIDENCE

A. Petitioner's Evidence

On September 25, 2012, the Commission issued a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and Beverage Cartage Permit to Respondent, located at 5201 S. Broadway, Suite 162, Tyler, Smith County, Texas.⁴ On September 22, 2014, Respondent filed an application for renewal of its permit. Respondent stated in its renewal application that it had \$327,000 in alcoholic beverage sales the previous year of its operation and \$340,000 in food sales. According to Respondent's application, alcoholic beverage sales were less than 50 percent of total gross sales for the previous year.⁵ On November 6, 2014, Staff informed Respondent that its renewal application had been denied because it did not qualify to hold a Food and

¹ Texas Alcoholic Beverage Code (Code) § 28.18(a).

² Code § 28.18(d).

³ Code § 11.61(b)(2).

⁴ Ex. P-1 at 1.

⁵ Ex. P-1 at 5-6.

Beverage Certificate.⁶

Brian Henderson, an accounts examiner for the Comptroller, testified that he personally examined sales data submitted to the Comptroller by Respondent for October of 2012 through March of 2015. Respondent's actual alcoholic beverage sales were \$1,415,512 and other sales were \$783,972. Mr. Henderson said Respondent's total gross sales were \$2,199,484 and alcoholic beverage sales were 64.3565 percent of total gross sales during the specified time frame.⁷ Therefore, he determined that Respondent did not qualify for a food and beverage certificate.

Additionally, Mr. Henderson testified that he examined and re-calculated sales data submitted to the Comptroller by Respondent for the 12-month period of June of 2014 through May of 2015. Respondent's alcoholic beverage sales were \$552,878 and other sales were \$421,178. Respondent's total gross sales were \$974,056. Respondent's alcoholic beverage sales were 56.7604 percent of total gross sales during the specified time frame.⁸ Mr. Henderson said based on the most recent sales data, Respondent does not qualify to hold a food and beverage certificate. On cross-examination, Mr. Henderson stated that he did not review Respondent's sales data for the months of June and July of 2015.

Staff alleged that on or about October 23, 2014, Respondent failed to qualify to hold a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and Beverage Cartage Permit as the gross receipts of mixed beverages sold exceeded 50 percent of the total gross receipts from the premises in violation of the Code. Staff argued that because Respondent's gross receipts for mixed beverages have consistently exceeded 50 percent of the total gross receipts of the premises, Respondent's permit should be cancelled for non-compliance with the Code.

⁶ Ex. P-1 at 3-4.

⁷ Ex. P-4.

⁸ Ex. P-4a.

B. Respondent's Evidence

Mr. Florendo agreed with Staff that Respondent's alcoholic beverage sales exceeded 50 percent of gross sales. However, he testified that the amount of Respondent's food sales increased during the months of June and July of 2015, and exceeded Respondent's alcoholic beverage sales for those 2 months.

IV. ANALYSIS

The Comptroller's calculations show that from October of 2012 through May of 2015 Respondent's average gross receipts for mixed beverages were greater than 50 percent of total gross receipts. Accordingly, the evidence supports Staff's contention that Respondent consistently violated Code § 28.18(a) for more than 2 years. The evidence shows that the Comptroller did not certify that Respondent was in compliance with the required sales percentages. Therefore, the Commission is authorized to deny Respondent's request to renew its Food and Beverage Certificate.⁹ In addition, based on the evidence in the record, Staff has shown that Respondent has violated a provision of the Code. The Commission may, therefore, cancel Respondent's permit.

V. FINDINGS OF FACT

1. On September 25, 2012, the Texas Alcoholic Beverage Commission (Commission) issued a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and a Beverage Cartage Permit to Test Kitchen LLC, d/b/a Cork Food & Wine, located at 5201 S. Broadway, Suite 162, Tyler, Smith County, Texas (Respondent).
2. On September 22, 2014, Respondent filed an application to renew its Mixed Beverage Restaurant Permit with Food and Beverage Certificate and Beverage Cartage Permit (application).
3. Respondent stated in its application that the sales data for the prior year was \$327,000 in alcoholic beverage sales and \$340,000 in food sales.

⁹ Code § 28.18(d)

4. On November 6, 2014, Staff informed Respondent that the application had been denied because it failed to qualify to hold a Food and Beverage Certificate.
5. On November 14, 2014, Respondent filed a Motion for Reconsideration.
6. On December 5, 2014, the Commission issued an Order on Petitioner's Response to Respondent's Motion for Reconsideration granting Respondent's Motion for Reconsideration.
7. Sales information provided by Respondent to the Comptroller of Public Accounts (Comptroller) showed that Respondent had \$1,415,512 in alcoholic beverage sales and \$783,972 in other sales from October of 2012 through March of 2015. Respondent's total gross sales were \$2,199,484.
8. The alcoholic beverage sales at Respondent's licensed premises from October of 2012 through March of 2015 were 64.3565 percent of total gross sales.
9. The alcoholic beverage sales for Respondent's licensed premises were in excess of 50 percent of total gross sales from October 2012 through March 2015.
10. The Comptroller did not certify that Respondent was in compliance with the requirement that the gross receipts of mixed beverages were 50 percent or less of the total gross receipts of the premises.
11. From June of 2014 through May of 2015, Respondent had \$552,878 in alcoholic beverage sales and \$421,178 in other sales. Respondent's total gross sales were \$974,056.
12. The alcoholic beverage sales at Respondent's licensed premises from June of 2014 through May of 2015 were 56.7604 percent of total gross sales.
13. On June 24, 2015, Commission Staff (Petitioner) issued its notice of hearing by first class mail and certified mail, return receipt requested, to Respondent at Respondent's last known mailing address of 5709 Palo Pinto, Tyler, Smith County, Texas, 75707, setting the hearing on the merits for August 10, 2015.
14. The notice contained a statement of the time, place, 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 matters asserted.

15. On August 10, 2015, the hearing convened before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Brenda Coleman in Dallas, Texas. Staff was represented by attorney Shelia A. Lindsey. Respondent was represented by Jon Florendo. Following presentation of evidence, the record closed on August 10, 2015.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code (Code) chapter 5 and §§ 11.61 and 28.18.
2. 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 Texas Government Code chapter 2003.
3. Proper and timely notice of the hearing was provided to Respondent. Tex. Gov't Code §§ 2001.051-052.
4. Respondent failed to qualify to hold a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and Beverage Cartage Permit because the gross receipts of mixed beverages sold at Respondent's premises exceeded 50 percent of its total gross receipts. Code § 28.18(a).
5. Respondent's renewal application may be denied. Code § 28.18(d).
6. Respondent violated Code § 28.18(a).
7. Respondent's permit may be cancelled. Code § 11.61(b)(2).

SIGNED October 6, 2015.


Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings

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 Respondent's renewal application for the above permits and certificate be **DENIED**.

This Order will become **final and enforceable** on the 23rd day of January, 2016, **unless a Motion for Rehearing is filed by the 22nd day of January, 2016.**

SIGNED this the 30th day of December, 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 30th day of December, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Brenda Coleman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150A
Dallas, TX 75235
VIA FACSIMILE: (512) 322-2061

Test Kitchen, LLC
d/b/a Cork Food and Wine
RESPONDENT
5709 Palo Pinto
Tyler, TX 75707
VIA FIRST CLASS MAIL, CMRRR # 70150640000460343351

Shelia Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Shelia.lindsey@tabc.texas.gov