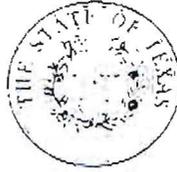


# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 5, 2008

Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78731

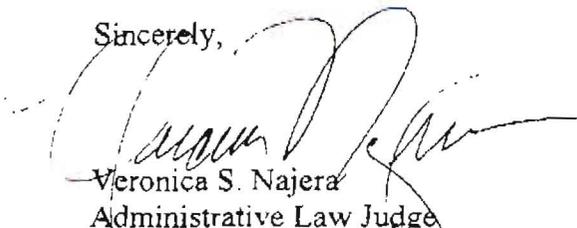
**VIA FACSIMILE NO. 512-206-3350**

**RE: Docket No. 458-08-2994**  
***Texas Alcoholic Beverage Commission v. Mulligan's North Bar & Grill***  
***LLC d/b/a Mulligan's North Bar & Grill***

Dear Ms. Fox:

Please find enclosed the Proposal for Decision on the above referenced case. I am recommending a 45 day suspension or, in lieu of suspension, payment of a civil penalty in the amount of \$6,750.00.

Sincerely,

  
Veronica S. Najera  
Administrative Law Judge  
State Office of Administrative Hearings  
El Paso Regional Office

VSN/cr

Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA Docket Change Form**

Emily E. Helm, Attorney, TABC Legal Division- **VIA Facsimile No. 512-206-3498**

Mark T. Davis **VIA Facsimile No. 915-629-9691**



The Respondent was represented by Mark T. Davis, attorney at law. The record closed on July 30, 2008, upon the conclusion of the hearing.

## II. APPLICABLE LAW

The TABC 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 permittee violated a provision of this Code.<sup>2</sup> The Petitioner is alleging that Respondent violated section 28.09 of the Code which mandates a holder of a permit to immediately, after emptying a bottle, invalidate the identification stamp on the bottle in the manner prescribed by rule.<sup>3</sup> Furthermore, the agency has very specific procedures regarding the invalidation of identification stamps on empty distilled spirits bottles.<sup>4</sup> All identification stamps are to be mutilated.<sup>5</sup> In addition, a separate offense is committed for each bottle so possessed.<sup>6</sup>

## III. DISCUSSION

Mulligan's North Bar & Grill operates under the authority of a mixed beverage permit, which includes a beverage cartage permit, a caterer's permit, and a mixed beverage late hours permit.<sup>7</sup> The permit was originally issued in 2001.<sup>8</sup> Respondent testified that the bar generates \$80,000.00 in alcohol sales per month.

Agent Robert Chavez testified that a routine inspection was effectuated on Mulligan's North Bar & Grill on March 1, 2008. In the course of the inspection, three empty distilled spirit

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<sup>2</sup> *Id.* at § 11.61(b)(2) [Cancellation or Suspension of Permit].

<sup>3</sup> *Id.* at § 28.09.

<sup>4</sup> The TABC's rules §§ 41.71 and 41.72 prescribe detail procedures for the affixing and invalidation of identification stamps on bottles.

<sup>5</sup> "Mutilate" means to scratch, cut, tear, or abrade in a manner which inflicts obvious and substantial damage to the stamp but does not totally remove or obliterate the stamp. See TABC's rule § 41.72(b) and (c).

<sup>6</sup> Code at § 28.09(d).

<sup>7</sup> See Petitioner's Exhibit No. 2. Respondent's permit number is MB-495462.

<sup>8</sup> *Id.*

bottles were found with identification stamps not invalidated.<sup>9</sup> All three bottles were in the “area in use” of the bar.<sup>10</sup> There is no disagreement between the parties that these bottles were, in fact, found with unmutated stamps. The issue centers on the time frame for the stamp mutilation. Testimony is of record that it is the bar’s policy to inventory empty bottles at the end of the day, or night, and not immediately upon emptying. Alfonso Diaz, one of three partners, testified that the bar utilizes a “log in/out book” in which bottles are logged out upon mutilation. He described two procedures utilized at the bar. First, the bartender writes the identification number on a piece of paper, the number is subsequently entered in the log in/out book, and then the stamp is mutilated. Alternatively, the bartender gives the empty bottle to the manager for the stamp mutilation in conjunction with a replacement bottle.

#### IV. ANALYSIS

The Code requires immediate invalidation of the identification stamp upon emptying a bottle. The requirement is specific. The procedures utilized by Respondent do not account for immediate invalidation. In addition, neither of the two procedures described by Mr. Diaz was followed on March 1, 2008. In fact, the empty bottles were among other bottles in the “area in use” of the bar.

Respondent argued that it is being forced to violate other state agency rules, specifically mentioning the Comptroller of Public Accounts, if it follows the TABC rules. This argument is not persuasive. There is no evidence of record that Respondent’s in-house order control system via the use of a manual log in/out book and procedures described in Section III above, are a state agency requirement.

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<sup>9</sup> Petitioner’s Exhibit No. 3, photograph depicting a Bacardi bottle, a Vodka bottle and a Hornitos bottle. All bottles are empty of contents and have unmutated identification stamps affixed to them.

<sup>10</sup> See Respondent’s Exhibit Nos. 1 and 2, drawings of bar top area and ledge, island, bar well, and wait station. The Bacardi bottle was found on the counter top behind the bar. The Vodka and Hornitos bottles were in stock with other bottles on the bar island. These areas were designated the “area in use.”

In addition, Respondent has been issued two prior administrative warnings for the same failure to mutilate stamp violation.<sup>11</sup> Respondent's administrative history also includes a failure to report a breach of the peace, a cash law violation, and sale to an intoxicated person in which a civil penalty was paid.<sup>12</sup> The three bottles represent Respondent's third, fourth, and fifth offense for failure to immediately invalidate the identification stamp on empty distilled spirit bottles.

For the reasons stated in the preceding paragraphs, the ALJ recommends a 15 day suspension for each offense, totaling a 45 day suspension or, in lieu of suspension, payment of a \$6,750.00 civil penalty.

## V. FINDINGS OF FACT

1. Mulligan's North Bar & Grill LLC d/b/a Mulligan's North Bar & Grill (Respondent) holds a mixed beverage permit, which includes a beverage cartage permit, a caterer's permit, and a mixed beverage late hours permit, issued by the Texas Alcoholic Beverage Commission (TABC) under number MB-495462 for the premises located at 10710 North Gateway Blvd., Suite A1, El Paso, El Paso County, Texas.
2. A notice of hearing was issued on May 16, 2008, by the TABC, apprising all parties of Petitioner's allegations and of the hearing date.
3. A hearing was convened on July 30, 2008, before Administrative Law Judge (ALJ) Veronica S. Najera at the SOAH El Paso Regional Office. The TABC's staff was represented at the hearing by Emily E. Helm, staff attorney. The Respondent was represented by Mark T. Davis, attorney at law.
4. The record closed on July 30, 2008.
5. Respondent's administrative violation history includes two prior warnings for the failure to mutilate stamp violation, a failure to report a breach of the peace violation, a cash law violation, and sale to an intoxicated person violation in which a civil penalty was paid.
6. A routine inspection was effectuated on Mulligan's North Bar & Grill on March 1, 2008 by the TABC.

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<sup>11</sup> Petitioner's Exhibit No. 2, at p. 3, administrative violations record.

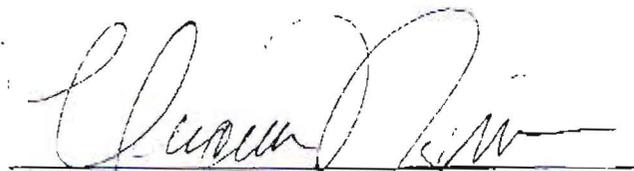
<sup>12</sup> *Id.*

7. In the course of the inspection, three empty distilled spirits bottles were found with their identification stamps not mutilated.
8. All three bottles were in the "area in use" of the bar.
9. The three identification stamps on the bottles were not mutilated immediately after emptying the bottles on March 1, 2008

## VI. 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) §§ 155.27 and 155.55 and Code §11.63.
4. Based upon the Findings of Fact, Respondent failed to immediately after emptying three distilled spirit bottles invalidate the identification stamp on each bottle in the manner prescribed by rule, in violation of Code §§ 28.09, 11.61(b)(2) and 16 TAC § 41.72.
5. Respondent's permit should be suspended for 45 days or, in lieu of suspension, Respondent should be ordered to pay \$6,750.00 in civil penalty.

**SIGNED** September 5, 2008.



**VERONICA S. NAJERA**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**DOCKET NO. 574660**

|                                     |   |                     |
|-------------------------------------|---|---------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION | § | BEFORE THE TEXAS    |
|                                     | § |                     |
|                                     | § |                     |
| VS.                                 | § |                     |
|                                     | § |                     |
| MULLIGAN'S NORTH BAR & GRILL LLC    | § |                     |
| D/B/A MULLIGAN'S NORTH BAR & GRILL  | § | ALCOHOLIC           |
| PERMIT/LICENSE NO(s). MB495462      | § |                     |
| EL PASO COUNTY, TEXAS               | § |                     |
| (SOAH DOCKET NO.458-08-2994)        | § | BEVERAGE COMMISSION |

**ORDER**

**CAME ON FOR CONSIDERATION** on this day the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on the 30<sup>th</sup> day of July, 2008 and adjourned on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 5<sup>th</sup> day of September, 2008. 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 Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which 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 Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**I. FINDINGS OF FACT**

Based upon the Proposal for Decision, on or about March 1, 2008, Respondent failed to immediately, after emptying three distilled spirit bottles, invalidate the identification stamp on each bottle in the manner prescribed by rule, in violation of TABC Code §§ 28.09, 11.61(b)(2) and 16 TAC § 41.72.

**II. CONCLUSIONS OF LAW**

Respondent's permit should be suspended for 45 days or, in lieu of suspension, Respondent should be ordered to pay \$6,750.00 in civil penalty.

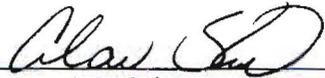
**IT IS THEREFORE ORDERED**, by the Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your Mixed Beverage Permit, Beverage Cartage Permit, Caterer's Permit, and Mixed Beverage Late Hours Permit, is hereby **SUSPENDED** for **forty-five (45)** days, or, in lieu of suspension, payment of a civil penalty in the amount of **\$6,750.00**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$6,750.00** on or before the **26<sup>th</sup> day of November, 2008**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **forty-five (45) days** beginning at 12:01 A.M. on the **4<sup>th</sup> day of December, 2008**.

This Order will become final and enforceable on November 3, 2008, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this 13<sup>th</sup> day of October, 2008, at Austin, Texas.

  
\_\_\_\_\_  
Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

The Honorable Veronica S. Najera  
Administrative Law Judge  
SOAH- El Paso  
**VIA FACSIMILE: (915) 834-5657**

Mark T Davis  
**ATTORNEY FOR RESPONDENT**  
1554 Lomaland  
El Paso, TX 79935  
Telephone: (915) 779-3596  
**VIA FACSIMILE: (915) 629-9691**

MULLIGAN'S NORTH BAR & GRILL LLC  
d/b/a MULLIGAN'S NORTH BAR & GRILL  
**RESPONDENT**  
10710 Gateway Blvd. N. Ste A-1  
El Paso, TX 79924

Emily E. Helm  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
District Office

EH/cj

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 574660

REGISTER NUMBER:

NAME: MULLIGAN'S NORTH BAR & GRILL LLC

TRADENAME: MULLIGAN'S NORTH BAR & GRILL

ADDRESS: 10710 GATEWAY BLVD N STE A-1, EL PASO, TX 79924

DUE DATE: NOVEMBER 26, 2008

PERMITS OR LICENSES: MB495462

AMOUNT OF PENALTY: \$6,750.00

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.

**DOCKET NO. 574660**

|  |   |                     |
|--|---|---------------------|
| IN RE MULLIGAN'S NORTH BAR & GRILL LLC       | § | BEFORE THE TEXAS    |
| D/B/A MULLIGAN'S NORTH BAR & GRILL           | § |                     |
| PERMIT/LICENSE NO(s). MB495462, CB & LB & PE | § | ALCOHOLIC           |
|  | § |                     |
| EL PASO COUNTY, TEXAS                        | § |                     |
| (SOAH DOCKET NO. 458-08-2994)                | § | BEVERAGE COMMISSION |

**ORDER DENYING MOTION FOR REHEARING**

On this day the above numbered and styled cause came on for consideration. On October 13, 2008, an Order was issued suspended Respondent's permits, licenses and certificates. Respondent filed a Motion for Rehearing on September 25, 2008.

**IT IS THEREFORE ORDERED** that the Motion For Rehearing is **DENIED**.

By copy of this Order service shall be made upon Mark T. Davis, Attorney for Respondent, MULLIGAN'S NORTH BAR & GRILL LLC, in the manner indicated below, on the date signed.

**SIGNED** this 21st day of October, 2008.



Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

Veronica S. Najera  
Administrative Law Judge  
State Office of Administrative Hearings  
401 East Franklin Ave., Suite 580  
El Paso, Texas 79901  
*Via Facsimile (915) 834-5657*

Mark T. Davis  
**ATTORNEY FOR RESPONDENT**  
1554 Lomaland  
El Paso, Texas 79935  
*Via Facsimile (915) 629- 9691*

*originals  
filed 11-1-08*

MULLIGAN'S NORTH BAR & GRILL LLC  
**RESPONDENT**  
d/b/a MULLIGAN'S NORTH BAR & GRILL  
10710 GATEWAY BLVD N STE A-1  
EL PASO, TX 79924

EMILY E. HELM  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Enforcement District Office