

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 8, 2011

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA INTERAGENCY MAIL

RE: Docket No. 458-11-3156; Texas Alcoholic Beverage Commission v. Tequila Nights Private Club Inc. d/b/a Tequila Nights

Dear Mr. Steen:

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 black ink, appearing to read "SMR", with a long horizontal line extending to the right.

Steven M. Rivas
Administrative Law Judge

SMR/lh
Enclosure

xc Ramona M. Perry, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Emily Heim, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA INTERAGENCY MAIL (with Certified Evidentiary Record and 1 Hearing CD)
Eduardo Lopez, President, Tequila Nights Private Club Inc. d/b/a Tequila Nights, 1503 Austin Ave., Brownwood, TX 76801 - VIA REGULAR MAIL

SOAH DOCKET NO. 458-11-3156

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
TEQUILA NIGHTS PRIVATE CLUB INC. D/B/A TEQUILA NIGHTS, Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Commission or Staff) brought this enforcement action against Tequila Nights Private Club d/b/a Tequila Nights (Respondent or the club). Petitioner sought cancellation of Respondent's permits, alleging that Respondent has engaged in-conduct prohibited by the Texas Alcoholic Beverage Code (the Code) and/or Commission's rules (the Rules). The Administrative Law Judge (ALJ) recommends no action be taken against Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law.

On April 12, 2011, a hearing convened before State Office of Administrative Hearings (SOAH) ALJ Steven M. Rivas. Petitioner was represented at the hearing by Ramona M. Perry, the Commission's Staff Attorney. Respondent's president, Eduardo Lopez, appeared on behalf of Respondent. Evidence and argument were presented and the record closed on the same date.

II. DISCUSSION AND ANALYSIS

A. Applicable Law and general Operating Guidelines for Private Clubs

The Commission may suspend or cancel a permit if it is found that a permittee has violated a provision of the Code or the Rules.¹ A private club registration permit authorizes alcoholic beverages belonging to members of the club to be served for on-premises consumption to its members and guests.² Members of the club must be passed on and elected by a membership committee made up of three or more club members.³

A club is required to have 50 or more members at all times. When considering a membership application or termination of membership, the membership committee must keep written minutes showing the meeting date, names of all committee members present, and the name of any person admitted to membership or terminated from membership. The club must permanently maintain a roster of each admitted or removed member.

All records and minutes are required to be kept on the club premises and made available to any representative of the Commission upon reasonable notice.⁴ The club's affairs and management must be conducted by a board of directors, executive committee, or similar body chosen by the members at their annual meeting.⁵

Each private club registration permittee shall pay an annual state fee.⁶ The fee shall be based on the highest number of members during the year for which the permit fee is paid.⁷

¹ Code § 11.61(b)(2).

² Code § 32.01(a)(2).

³ Code § 32.03(c).

⁴ Rules §§ 41.52(c)(1)(A), (B), (D) and (E).

⁵ Code § 32.03(i).

⁶ Code § 32.02(a).

⁷ Code § 32.02(b)(1).

B. Background

Mr. Lopez holds a private club registration permit and beverage cartage permit (N667734) issued by the Commission on August 7, 2007, for the premises located at 717 West Commerce, Brownwood, Brown County, Texas.

Prior to the issuance of the permits, Mr. Lopez received a copy of Chapter 32 of the Code pertaining to private clubs, along with pertinent sections of the Rules. Commission compliance personnel also personally met with Mr. Lopez for a comprehensive interview. During the interview, Mr. Lopez acknowledged, as evidenced by his signature, that violations of the Code or the Rules by him or his employees could result in a suspension or cancellation of Mr. Lopez's license and/or permit.⁸ Record keeping requirements regarding membership accounts for a private club were covered in detail.⁹

Staff contends that Mr. Lopez failed to adhere to certain rules and regulations for private clubs by failing to have the appropriate membership records on the premises and by failing to pay the required permit fee. In support of its position, Staff presented the testimony of TABC agents Paul Morgan, and Thomas Johnson.

C. TABC's Evidence and Argument**1. Failure to maintain records on the premises**

Agent Morgan testified that when he inspects private clubs, his goal is to ensure the club is in compliance with Commission rules. Agent Morgan testified that on May 18, 2010, he went to the premises and requested to see the records pertaining to the operation of the club including its invoices, membership lists, and minutes from any membership committee meetings. Agent Morgan

⁸ TABC Ex. No. 8; Acknowledgment of Application Interview signed by Mr. Lopez on July 17, 2007.

⁹ TABC Ex. No. 9; Acknowledgment of Record Keeping Requirements signed by Mr. Lopez on July 17, 2007

testified he met with the club's manager, Chris Marsh, and was informed there were no records on the premises. Several minutes later, Mr. Lopez arrived at the premises with membership records from 2009, but no records from 2007 or 2008. Agent Morgan issued a citation to Mr. Lopez for failure to maintain records on the premises.

Mr. Lopez admitted there were no records on the premises when Agent Morgan performed the inspection because he had moved the records to his office inside a body shop that he owned. Mr. Lopez testified that some of the records were damaged during a storm that tore the roof off of the club, although he could not recall when the storm occurred. Mr. Lopez argued he should have received a warning instead of a citation, but provided no basis as to why a citation was not proper.

2. Failure to pay the required permit fee

Agent Johnson testified he performed an audit of the club on May 12, 2010. The purpose of the audit was to calculate the appropriate permit fee by determining the number of club members. Agent Johnson testified he reviewed membership applications, membership committee minutes, and lists of members generated by a computer program. The computer program Mr. Lopez used to track the club's membership was implemented by a company known as WeScan.¹⁰

Pursuant to the Code § 32.02(b)(1), the permit fee is based on the highest number of members during the year for which the permit fee is paid determined by the following rates:

Members	Permit Fee
0-250	\$750
251-450	\$1,350
451-650	\$1,950
651-850	\$2,550
851-1000	\$3,000
Over 1000	\$3 per member

As shown, the lowest permit fee bracket consisting of 0-250 members requires a \$750 annual permit fee. As a club's membership number increases, it enters a higher bracket level, and thus increases the amount of the permit fee. For permit years 2007 and 2008, the club had only 50 members and was required to pay \$750 each year, which it did.

Agent Johnson offered a membership analysis (analysis) at the hearing, and testified the analysis was based on the audit he conducted. In addition to the permit fees paid in 2007 and 2008, the analysis reflects Mr. Lopez paid \$750 for permit years 2009 and 2010 even though the club's membership began to increase in 2009.¹¹

The analysis reflects that on March 1, 2009, club membership was at 357, and on September 12, 2009, the club had 297 members. Similarly, on three occasions in January 2010, club levels were recorded at 615, 826, and 946. The analysis indicated that on February 21, 2010, the number of club members peaked at 1,464.

Agent Johnson's analysis concluded that Mr. Lopez was delinquent \$7,884 in permit fees based on the membership level increases reflected on the analysis. On May 14, 2010, the Commission sought payment of the total delinquent amount of \$7,884 from Mr. Lopez. On June 7, 2010, the Commission assessed a violation against Mr. Lopez for nonpayment of the \$7,884 delinquent amount.

D. Respondent's Case

Mr. Lopez's primary position was that the Commission agents should have offered him more guidance instead of issuing violations. As far as not having the records on the premises, Mr. Lopez admitted he made a mistake but asserted Agent Morgan should have issued a warning because it did not seem like a serious violation.

¹⁰ WeScan is based in Houston, Texas, according to Mr. Lopez.

¹¹ TABC Ex. No. 4.

As for the number of members, Mr. Lopez testified he relied on WeScan to monitor the club's membership list in order to maintain a membership level of 250 or less. Mr. Lopez contended he was not aware how the number of club members ever reached 615 or 1,464 since the club's maximum capacity is 300. Mr. Lopez admitted it was his responsibility to maintain the club's membership lists. However, he testified he no longer uses WeScan and currently uses another company that provides an accurate list of the club's members.

E. ALJ's Analysis and Recommendation

As a result of Mr. Lopez having attended the comprehensive interview sponsored by the Commission prior to the issuance of his permits, Mr. Lopez knew, or should have known, the appropriate requirements for operating a private club. Mr. Lopez has an obligation to abide by the provisions of the Code and the Rules, and is accountable for failing to meet this obligation. However, even if the allegations against Mr. Lopez were sufficiently proven, the ALJ is not convinced that cancelation of his permits is a proper remedy.

Agent Morgan inspected the premises on May 18, 2010, and found no records on the premises in violation of Commission rules §§ 41.52(c)(1)(A), (B), (D) and (E).¹² There is no question that Mr. Lopez should maintain records on the premises, but placing all the records on the premises is a relatively easy solution to this violation.

Mr. Lopez is also required to pay an annual permit fee. However, the ALJ is not persuaded by the figures presented on the analysis for several reasons: (1) the findings are conclusory and were offered with no underlying data; (2) the figures on the analysis appear to have been calculated incorrectly; and (3) in determining the appropriate permit fee, the analysis did not comply with Code § 32.02(b)(1).

¹² It should be noted that Agent Morgan inspected the premises less than a week after Agent Johnson's audit and that some of the records used in the audit may not have been returned to the premises when Agent Morgan performed his inspection.

1. Staff presented no underlying data of the analysis

The portion of the analysis that refers to the “number of members” is not supported by any data such as the membership lists or committee minutes that Agent Johnson reviewed in calculating this figure. Mr. Lopez raised questions that some of the member names were possibly duplicated on the membership lists. It is unclear to the ALJ whether some of the names listed on the membership lists are actual members or merely applicants, or guests of other members.

Mr. Lopez testified that each patron who enters the club is required to swipe his or her driver’s license into a reader that transmits the information into a program run by WeScan. The system was designed to recognize whether the patron was a member, an applicant, or a guest of another member. Mr. Lopez testified that even though he had very little knowledge on how WeScan operated, he relied on WeScan to monitor the club’s membership numbers so that it would never accept more than 250 members. With little to no evidence on the actual number of members, the ALJ is not convinced the membership levels reflected on the analysis are accurate.

2. The figures on the analysis were calculated incorrectly

The analysis reflects that on February 21, 2010, the club had 1,464 members. Because this figure reflected over 1,000 members, the analysis indicated, as shown below, that the correct permit fee should have been \$6 per member.¹³

Date	Members	Fee Bracket	Permit Fee
2/21/2010	1,464	\$6 per member	\$2,784.00

At \$6 per member for 1,464 members, the permit fee should have read \$8,784. However, the permit fee reflected on the analysis was a much lower figure of \$2,784.

If the permit fee was calculated at \$3 per member for 1,464 members, the fee should have read \$4,392, which is still more than the figure reflected on the analysis. Conversely, if the number of members was indicated correctly at 1,464, and the permit fee of \$2,784 was correct, the result would have reflected a per member amount of \$1.90. A per member amount of this kind is not permitted anywhere in the Code or Commission's rules. The fact that the figures on the analysis were incorrectly calculated lessens the credibility of the analysis.

3. The analysis did not comply with Code § 32.02(b)(1)

Pursuant to Code § 32.02(b)(1), the permit fee is based on the highest number of members **during the year** for which the permit fee is paid, which is determined by the membership levels listed above.

The analysis reflects that on January 4, 2010, the club's membership level reached 615. Due to this increase, Agent Johnson found the club had exceeded the threshold of the 0-250 bracket and determined the permit fee should have been calculated under the 451-650 permit fee bracket. The analysis indicates that on that date, based on being in the 451-650 permit fee bracket, Agent Johnson assessed a \$1,200 permit fee against Mr. Lopez.

The analysis next reflects that on January 10, 2010, the club's membership level reached 826. Due to this increase, Agent Johnson found the club had exceeded the threshold of the 451-650 bracket and determined the permit fee should have been calculated under the 651-850 permit fee bracket. On that date, because the club was in the 651-850 permit fee bracket, Agent Johnson assessed another \$1,200 permit fee against Mr. Lopez.

The analysis further reflects that on January 16, 2010, the club's membership level reached 946 and Agent Johnson found the club had exceeded the threshold of the 651-850 bracket

¹³ The correct permit fee should have been calculated at \$3 per member pursuant to § 32.02(a)(1).

and determined the permit fee should have been calculated under the 851-1000 permit fee bracket. On that date, Agent Johnson assessed a \$900 permit fee against Mr. Lopez.

According to Agent Johnson's testimony and the figures on the analysis, Mr. Lopez incurred four separate permit fees in January and February of 2010. This manner of calculating a private club's annual permit fee is not consistent with the Code § 32.02(b)(1), which stipulates that a permit fee shall be based on the highest number of members during the year. In this case, the club's permit fee should have been based on the highest number of members in 2010, which reached 1,464 on February 21, 2010.

By assessing four separate permit fees in 2010, the Commission did not properly base the permit amount using the criteria set out in § 32.02(b)(1). It appears the proper amount for permit year 2010 should have totaled \$4,392 at \$3 per 1,464 members. Adding each permit fee assessed in 2010 results in the following:

Date	Fee assessed
1/4/2010	\$1,200
1/10/2010	1,200
1/16/2010	900
2/21/2010	2,784
Total	\$6,084

For these reasons, the ALJ recommends no action be taken against Mr. Lopez's permits. However, even if both allegations were sufficiently proven, the ALJ does not agree that cancellation is a proper remedy.

The ALJ finds that, even if Mr. Lopez owes \$7,884, as Staff contends, he should be given a reasonable amount of time to pay or perhaps be given an opportunity to make payments to the Commission. The record reflects the Commission sought immediate payment of the alleged total delinquent amount on May 14, 2010; *the day after Agent Johnson completed his analysis*. Less than a month later; on June 7, 2010, the Commission assessed a violation against Mr. Lopez for non-

payment of the delinquent amount. This aggressive collection effort displays the Commission's unwillingness to work with Mr. Lopez.

If Mr. Lopez had a history of missed payments or consistent noncompliance, the ALJ would understand why Staff would seek cancellation. However, the record reflects Mr. Lopez paid permit fees totaling \$3,000 for the years 2007-2010. This does not reflect that Mr. Lopez has a pattern of nonpayment of his permit fee. Mr. Lopez was careless by not monitoring the club's membership levels. However, this behavior should not result in cancellation of his permits.

For all the reasons stated herein, the ALJ recommends no action be taken against Mr. Lopez's permits.

III. FINDINGS OF FACT

1. Tequila Nights Private Club, Inc. d/b/a Tequila Nights (Respondent or the club) holds a private club registration and beverage cartage permit (N667734) issued by the Texas Alcoholic Beverage Commission (Commission or TABC) for the premises located at 717 West Commerce, Brownwood, Brown County, Texas.
2. Eduardo Lopez serves as Respondent's president.
3. On July 17, 2007, Mr. Lopez attended a comprehensive interview with the Commission's compliance personnel in which all of the record keeping requirements of a private club were covered in detail.
4. On May 18, 2010, TABC Agent Paul Morgan inspected the club and found no records at the club.
5. Mr. Lopez was issued a citation for failing to properly maintain preliminary membership applications, minutes of membership committee meetings, and membership rosters on the premises.
6. Mr. Lopez utilized a company known as WeScan to monitor the club's membership level.
7. Mr. Lopez relied on WeScan to maintain the club's membership level at 250 members or less.

8. On May 12, 2010, TABC Agent Paul Johnson conducted an audit on Respondent to determine the correct permit fee for Respondent.
9. Following his audit, Agent Johnson completed a membership analysis, which reflected Respondent was delinquent \$7,884 in permit fees.
10. On June 7, 2010, the Commission issued a violation to Mr. Lopez, for having delinquent permit fees in the amount of \$7,884.
11. The analysis contains no underlying data to support the number of members the club had at any specific time.
12. The figures on the analysis were calculated incorrectly.
13. The figures on the analysis did not comply with the Commission's rules for determining an appropriate permit fee.
14. On February 10, 2011, Staff issued a notice of hearing informing all parties of the hearing in this matter.
15. The notice of hearing 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.
16. A hearing convened before SOAH ALJ Steven M. Rivas on April 12, 2011. The Commission appeared through its Staff Attorney, Ramona Perry. Respondent appeared on behalf of its president, Mr. Lopez. Evidence and argument were presented. The record closed on the same date.
17. Mr. Lopez can easily remedy the violation for not having records on the premises by maintaining records on his premises in the future.
18. Mr. Lopez does not have a pattern of not paying permit fees and should be given an opportunity to pay the Commission the appropriate permit fee amount.
19. None of the alleged violations rise to the level of permit cancellation.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 11.61, 32.06, and 109.53.

2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Mr. Lopez violated Commission rules at 16 TEX. ADMIN. CODE ANN. §§ 41.52(c)(1)(A), (B), (D) and (E) by not having records on the premises.
5. A preponderance of the evidence does not show that Mr. Lopez failed to pay the appropriate permit fee under TEX. ALCO. BEV. CODE ANN. §§ 32.02(a) and (b)(1).
6. No action should be taken against Mr. Lopez's permits.

SIGNED June 8, 2011.



**STEVEN M. RIVAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TABC DOCKET NO(s). 595296 & 594489

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
TEQUILA NIGHTS PRIVATE CLUB INC. D/B/A TEQUILA NIGHTS, Respondent	§	ALCOHOLIC
	§	
PERMITS NO. N667734, PE	§	
	§	
BROWN COUNTY, TEXAS (SOAH DOCKET NO. 458-11-3156)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of December, 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 Steven M. Rivas presiding. The hearing convened on April 12, 2011 and the SOAH record closed on that same date. The Administrative Law Judge (ALJ) made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on June 8, 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. Petitioner filed Exceptions on June 21, 2011. On July 13, 2011, the ALJ responded to Petitioner's Exceptions. In response to the Exceptions, the ALJ amended proposed Finding of Fact No. 17 but declined to make any other changes to the PFD.

At the outset, I want to note that in reviewing the evidence, the PFD, the Exceptions, and the ALJ's response thereto, it is important to note that I am constrained by Government Code §2001.058(e), which provides:

- (e) *A state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines:*
 - (1) *that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c) , or prior administrative decisions;*

- (2) *that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or*
- (3) *that a technical error in a finding of fact should be changed.*

The agency shall state in writing the specific reason and legal basis for a change made under this subsection.

On the first issue in this proceeding, there is no dispute that required records were not kept on the premises on May 18, 2010.¹ This is a violation of Commission Rule 41.52(c)(1)(E), and therefore also of Commission Rule 41.52(c)(4). Commission Rule 41.52(c)(4) merely restates Alco. Bev. Code (Code) §11.61(b)(2) and makes clear that it applies to private clubs. However, despite recognizing that an offense occurred², the ALJ declined to recommend any sanction for the violation. Proposed Finding of Fact No. 19 states: “None of the alleged violations rise to the level of permit cancellation”. Proposed Conclusion of Law No. 6 states: “No action should be taken against Mr. Lopez’s permits”.

Proposed Conclusion of Law No. 6 is deleted and the following Conclusion of Law No. 6 is substituted in its stead:

6. For the violation of 16 Tex. Admin. Code §41.52 and pursuant to 16 Tex. Admin. Code §34.3, Respondent’s permit should be suspended four (4) days, or in lieu thereof Respondent should be allowed to pay a civil penalty in the amount of \$1,200.00.

This change is made pursuant to Government Code §2001.058(e)(1), because the ALJ did not properly apply or interpret applicable law and agency rules. Just because this violation does not warrant cancellation, it does not mean that this violation should go unsanctioned. A four-day suspension reflects the Commission’s policy, as reflected in its rules, that this type of violation merits a sanction. Furthermore, the sanction assessed is within the range of sanctions that the Commission’s staff can authorize in a settlement outside of a contested case.

The other issue in this proceeding is whether Respondent violated Code §11.61(b)(5) by being indebted to the state for fees imposed by the Code. Code §§32.02(a) imposes a fee on private clubs.³ Respondent was at relevant times subject specifically to the Code §32.02(b)(1) fee requirement.⁴

¹ In his July 13, 2011 letter, the ALJ modified Proposed Finding of Fact No. 17 to recognize that on one occasion the Respondent had no records on the premises.

² In Proposed Finding of Fact No. 17 as amended by his July 13, 2011 letter, and in Conclusion of Law No. 4.

³ Pursuant to Code §11.09(a), the fees authorized by the Code must be doubled for a two-year permit. Under Commission Rule 33.25(d) (as it read at relevant times), a private club permit under Code Chapter 32 with an issue date on or after January 1, 2009 is a two-year permit. TABC Exhibit No. 10 indicates that Respondent applied to renew the permit in August, 2009, for a two-year period. The application form designates the applicable two-year permit fees, which in all cases are double the amounts actually listed in Code §32.02..

⁴ Subject to Code §32.02(c), Respondent could have chosen to be subject to the fee requirement in Code §32.02(b)(2). Respondent did not choose to do so.

TABC Exhibit No. 4 is the Membership Analysis conducted by TABC Auditor Thomas Johnson. It shows that Respondent was delinquent in the payment of permit fees in an amount totaling \$7,884.00. The ALJ is concerned that the Analysis “is not supported by any data such as the membership lists or committee minutes that Agent Johnson reviewed in calculating this figure”. This is a problem for the ALJ because it is “unclear to the ALJ whether some of the names listed on the membership lists are actual members or merely applicants, or guests of other members”. This concern is highlighted by Respondent’s testimony that some of the member names were possibly duplicated. Because of this confusion, “the ALJ is not convinced the membership levels reflected on the analysis are accurate”.

Having considered the evidence, I believe the numbers were calculated correctly and the analysis complied with Code §32.02(b)(1). However, Government Code §2001.058(e) constrains my ability to alter Proposed Findings of Fact that I consider wrong if my disagreement is based on the credibility of evidence. In this case, although I believe Petitioner did present sufficient credible evidence to carry its burden of proof, the ALJ does not.

The ALJ’s statement in Proposed Finding of Fact No. 18 that Respondent “should be given an opportunity to pay the Commission the appropriate fee amount” is evidence of two things: (1) he believes Respondent has not paid the appropriate fee amount, which means Respondent is in fact indebted to the State; and (2) he misunderstands the nature of this proceeding. This is not a debt-collection case. It is a case to decide whether a violation has occurred and, if so, what sanction should be assessed for that violation.

The ALJ states that “even if both allegations are sufficiently proven the ALJ does not agree that cancelation is a proper remedy”. For the record, a violation of Code §11.61(b)(5) by being indebted to the state for fees imposed by Code §32.02 (b)(1) does warrant cancellation. It is clearly the Legislature’s intent and Commission policy to not allow alcoholic beverage retailers to operate when it is proven that they owe these fees to the State.

Because even the ALJ agrees that Respondent has not yet paid the appropriate fees for the years at issue in this case, **I urge the Commission to take appropriate steps to ensure that Respondent pays the appropriate amount in the future.**

To correct a technical error⁵ pursuant to Government Code §2001.058(e)(3), **Proposed Finding of Fact No. 8 is deleted and the following Finding of Fact No. 8 is substituted in its stead:**

8. On May 12, 2010, TABC Agent Thomas Johnson conducted an audit on Respondent to determine the correct permit fee for Respondent.

With the changes recited herein to Conclusion of Law No. 6 and Finding of Fact No. 8, I incorporate the Findings of Fact and Conclusions of Law that are contained in the Proposal for Decision, as amended by the ALJ’s July 13, 2011 letter, into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts

⁵ The auditor’s first name is incorrect in the Proposed Finding.

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 activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on January 25, 2012, and shall remain suspended for **four (4)** consecutive days, **UNLESS** Respondent pays a civil penalty in the amount of **\$1,200.00** on or before January 17, 2012.

If this Order is appealed and judgment is issued affirming the Order, 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 **four (4)** consecutive days, **UNLESS** Respondent pays the civil penalty in the amount of **\$1,200.00** on or before the **TENTH (10th)** day following the date the judgment is signed.

This Order will become final and enforceable on the 9th day of January, 2012, unless a Motion for Rehearing is filed **BEFORE** that date.

SIGNED this the 15th day of December, 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 15th day of December, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Steven M. Rivas
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th St. Ste. 502
Austin, TX 78701
VIA FACSIMILE: (512) 322-2061

Tequila Nights Private Club Inc.
d/b/a Tequila Nights
RESPONDENT
1503 Austin Ave.
Brownwood, TX 76801
VIA REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA ELECTRONIC MAIL
Ramona.Perry@TABC.STATE.TX.US

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 595296 & 594489 REGISTER NUMBER:

NAME: TEQUILA NIGHTS PRIVATE CLUB INC.

TRADENAME: TEQUILA NIGHTS

ADDRESS: 1503 Austin Ave., Brownwood, TX 76801

DUE DATE: January 17, 2012

PERMITS OR LICENSES: N667734, PE

AMOUNT OF PENALTY: \$1,200.00

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.