

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 14, 2011

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

VIA REGULAR MAIL

RE: Docket No. 458-11-7094; Texas Alcoholic Beverage Commission vs. Wright-Peavy Holdings LLC d/b/a Dowling Street

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 § 155.59(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

RECEIVED

OCT 17 2011

TABC HOUSTON
LEGAL

SB/mr
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with Certified Evidentiary Record and 1 hearing CD)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Harold V. Dutton, Jr., Attorney at Law 2323 Caroline Street, Houston, Texas 77004 -**VIA REGULAR MAIL**

2020 North Loop West Suite 111 Houston, Texas 77018
713.957.0010 (Telephone) 713.812.1001 (Fax)
www.soah.state.tx.us

SOAH DOCKET NO. 458-11-7094

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
VS.	§	
WRIGHT-PEAVY HOLDINGS LLC	§	OF
D/B/A DOWLING STREET BAR	§	
& LOUNGE	§	
PERMIT NO. MB-755882, LB & PE	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 601354)	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Staff or TABC) requested that the permit of Wright-Peavy Holdings LLC, d/b/a Dowling Street Bar & Lounge (Respondent) be suspended for 8 days because on March 18, 2011, Respondent or its agent, servant, or employee, possessed or permitted another to possess on the premises distilled spirits in a container not bearing a serially numbered identification stamp, in violation of the Texas Alcoholic Beverage Code (Code).

The Administrative Law Judge (ALJ) finds Staff has proven Respondent committed the alleged violation. For reasons set out below, the ALJ recommends a 4-day suspension or \$300 per day penalty in lieu of suspension, instead of the 8-day suspension requested by the Staff.

I. PROCEDURAL HISTORY AND JURISDICTION

There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing on the merits convened and the record closed on August 19, 2011, at the State Office of Administrative Hearings (SOAH), 2020 North Loop West, Suite 111, Houston,

Texas, before ALJ Stephen J. Burger. The TABC was represented by attorney Sandra Patton. Respondent appeared through its attorney Harold Dutton.

II. APPLICABLE LAW

The commission may suspend for not more than 60 days or cancel a permit if it is found that the permittee violated a provision of the code or a commission rule. TEX. ALCO. BEV. CODE ANN. (Code) § 11.61(b)(2). Additionally, a permittee may not possess or permit a person to possess on the premises distilled spirits in any container not bearing a serially numbered identification stamp issued by the commission. Code § 28.14.

III. EVIDENCE, ANALYSIS AND RECOMMENDATION

A. Evidence

1. Testimony of Edward Shannon

Edward Shannon, an agent with Petitioner, stated that on March 18, 2011, he went to Respondent's premises to investigate a complaint of alcohol containers not bearing identification stamps. Agent Shannon found an unopened bottle of Bacardi Island Iced Tea, a distilled spirits, in a trash bin outside the rear door of the bar. The bottle did not have a stamp affixed. The bartender, Courtney Davis, stated that the bar did not sell that particular brand. Agent Shannon also found two bottles of Barton Long Island Iced Tea that did not have stamps affixed. Ms. Davis told him she did not believe stamps were required on this type of beverage.

Agent Shannon contacted Mr. Wright, the owner of the bar, by phone on March 18, 2011. Mr. Wright had no explanation for the two bottles of Barton Long Island Iced Tea found at the bar. As to the bottle found in the trash bin outside the back door, Mr. Wright told Agent Shannon that that bottle must have been placed there by a homeless person.

A week prior to the hearing, Agent Shannon spoke to J's Good Spirits, a distributor to

Respondent. The distributor's representative stated that she had forgotten to place stamps on the bottles of Barton Long Island Iced Tea sold to Respondent.

Agent Shannon issued an administrative notice of violation to Respondent on March 18, 2011. He also testified that it is the responsibility of the permittee to check for stamps on bottles when they are delivered.

2. Testimony of Lloyd Wright

Mr. Wright, Respondent's representative, testified that his bar did not purchase the bottle of Bacardi Island Iced Tea found in the trash bin outside the rear door of the bar. He also stated that other businesses have access to the trash bins where the bottle was found.

Mr. Wright testified that he purchased the Barton Long Island Iced Tea bottles from J's Good Spirits. He said that the owner of J's Good Spirits told him she forgot to put stamps on those particular bottles. Mr. Wright discharged the bartender as a result of this investigation.

B. ALJ's analysis and recommendation

The uncontroverted evidence shows, and the ALJ finds, that on March 18, 2011, two bottles of Barton Long Island Iced Tea, distilled spirits, were observed by a TABC agent at Respondent's bar. The bottles did not bear identification stamps. The evidence also shows that the distributor who sold the bottles to Respondent had not affixed identification stamps to the two bottles of Barton Long Island Iced Tea found at Respondent's bar. The bartender for Respondent believed that identification stamps were not needed on this type of beverage. The ALJ finds that the distributor's mistake in failing to place stamps on the bottles sold to Respondent contributed to the bartender's mistake of assuming the stamps were not needed on this type of beverage.

Regarding the bottle found outside the rear door of the bar in a trash bin, the ALJ finds Mr. Wright's testimony credible that the bar did not sell that brand of spirits. The bottle was also

found in a common area behind the bar that is shared with other businesses.

The TABC requests that the Respondent's permits be suspended for 8 days, or that a \$300 per day penalty in lieu of suspension be imposed. Based on all the circumstances, the ALJ believes that an 8-day suspension is excessive. Based on subsections (b) and (c) of Code § 11.64, the TABC may relax provisions of the Code relating to the suspension of a permit and assess a sanction that is just under the circumstances on a payment of a fee not less than \$75 nor more than \$500, if any of the following factors are found: (1) The violation could not reasonably have been prevented by the permittee by the exercise of due diligence; (2) the permittee or licensee was entrapped; (3) an agent or employee of the permittee violated the code without the knowledge of the permittee; (4) the permittee did not knowingly violate the code; (5) the permittee has demonstrated good faith, including taking an action to rectify the consequences of the violations and to deter future violations; and (6) the violation was technical.

The ALJ finds sufficient evidence of factors four and five. Respondent's bartender mistakenly believed that the Barton Long Island Tea bottles did not require stamps. This is further supported by the fact that the distributor had not placed stamps on the bottles. Additionally, Respondent terminated the bartender's employment, which, although drastic, did rectify the consequences of the violation and could possibly prevent future violations.

Although not specifically listed as a mitigating factor, the ALJ also finds that this is the only violation on Respondent's record. Considering all these factors, the ALJ recommends a 4-day suspension or a \$300 per day monetary suspension.

IV. FINDINGS OF FACT

1. Wright-Peavy Holdings LLC, d/b/a Dowling Street Bar & Lounge (Respondent) is the holder of a Mixed Beverage Permit, Mixed Beverage Late Hours Permit and a Beverage Cartage Permit MB755882, LB & PE, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 4409 Dowling Street, Houston, Harris County, Texas, 77004.
2. On July 7, 2011, the TABC sent a Notice of Hearing to Respondent.

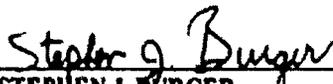
3. The July 7, 2011, Notice of Hearing contained a statement of the location and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the allegations and the relief sought by the TABC.
4. On August 19, 2011, a public hearing was held before Administrative Law Judge Stephen J. Burger. The TABC appeared through its staff attorney Sandra Patton. Respondent appeared through its attorney Harold Dutton. Evidence was presented and the record closed.
5. On March 18, 2011, Edward Shannon, an agent with the TABC, observed two bottles of Barton Long Island Iced Tea at Respondent's bar that did not have TABC identification stamps affixed, and a bottle of Bacardi Island Iced Tea without a TABC identification stamp affixed was found in a trash bin outside the rear door of the bar.
6. Barton Long Island Iced Tea and Bacardi Island Iced Tea are distilled spirits requiring TABC identification stamps.
7. Respondent did not purchase the Bacardi Island Iced Tea found in a trash bin outside the rear door of Respondent's bar on March 18, 2011.
8. J's Good Spirits, a distributor selling alcoholic beverages to Respondent, did not sell the Bacardi Island Iced Tea to Respondent.
9. J's Good Spirits, a distributor selling alcoholic beverages to Respondent, failed to affix TABC identification stamps to the bottles of Barton Long Island Iced Tea sold to Respondent.
10. Courtney Davis, bartender for Respondent, believed that the bottles of Barton Long Island Iced Tea did not require TABC identification stamps to be affixed.
11. Respondent's record does not indicate any prior TABC violations.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 1.06 and ch. 5, subch. B.
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Proper and timely notice of the hearing was provided as required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

4. Based on the above Findings of Fact, on March 18, 2011, Respondent, its agent, servant, or employee, possessed or permitted another to possess on its premises distilled spirits in a container not bearing a serially numbered identification stamp, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 28.15.
5. Based on the Findings of Fact and Conclusions of Law, Respondent's permit should be suspended for four days, or in lieu of suspension, Respondent may pay a \$300 per day penalty for a total of \$1200. TEX. ALCO. BEV. CODE ANN. §§ 11.61, 11.64, and 11.641.

SIGNED October 14, 2011.



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

DOCKET NO. 601354

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
WRIGHT-PEAVY HOLDINGS LLC D/B/A	§	
DOWLING STREET BAR & LOUNGE,	§	ALCOHOLIC
Respondent	§	
	§	
PERMIT NO. 755882, LB & PE	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-11-7094)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this **15TH** day of **AUGUST**, 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 Stephen J. Burger presiding. The hearing convened on August 19, 2011 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 October 14, 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. 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 Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein. As of this date no exceptions have been filed.

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 **26TH DAY OF SEPTEMBER, 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 **18TH DAY OF SEPTEMBER, 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 11TH DAY OF SEPTEMBER, 2012, unless a Motion for Rehearing is filed on or before the 10TH DAY OF SEPTEMBER, 2012.

SIGNED this the **15TH** day of **AUGUST, 2012**, at Austin, Texas.



Sherry K-Cook, 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 AUGUST, 2012.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Stephen J. Burger
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: 512.322.0474

Wright- Peavy Holdings LLC
d/b/a Dowling Street Bar & Lounge
RESPONDENT

4409 Dowling St
Houston, TX 77004
VIA CERTIFIED MAIL NO. 7007 0710 0005 4782 8473

Harold V. Dutton, Jr.
ATTORNEY FOR RESPONDENT
2323 Caroline Street
Houston, Texas 77004
VIA FACSIMILE: 713.659.2812

Sandra Patton
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL: SANDRA.PATTON@TABC.STATE.TX.US

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 601354 REGISTER NUMBER:

NAME: WRIGHT-PEAVY HOLDINGS, LLC

TRADENAME: DOWLING STREET

ADDRESS: 4409 DOWLING STREET, HOUSTON, TEXAS 77004

DUE DATE: 9/18/2012

PERMITS OR LICENSES: MB755882, LB & PE

AMOUNT OF PENALTY: \$1,200

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.