

DOCKET NO. 608795

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
TEJANO CITY LIMITS, L.L.P. D/B/A CLUB FUEGO, Respondent	§	ALCOHOLIC
	§	
PERMITS NO. MB640701, PE & LB	§	
	§	
BEXAR COUNTY, TEXAS (SOAH DOCKET NO. 458-12-4913)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 18th day of March, 2013, 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 Donald B. Dailey presiding. The hearing convened on April 25, 2012 and the SOAH record closed the same day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on May 16, 2012. 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. Exceptions were filed by Respondent on May 29, 2012 in a document styled Respondent's Exceptions and Replies. Petitioner did not file a response to the exceptions. The Administrative Law Judge reviewed the exceptions and by letter of July 10, 2012, declined to recommend an amendment to the Proposal for Decision.

Given the specific facts in this case on the record before me, and after review and due consideration of the Proposal for Decision, Respondent's exceptions and the Administrative Law Judge's evaluation thereof, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision with the following exception only:

Proposed Conclusion of Law No. 5 is deleted and Conclusion of Law No. 5 now reads:

Based on Findings of Fact Nos. 6 -8, no action should be taken against Respondent's permits.

This change to Conclusion of Law No. 5 is made pursuant to Government Code §2001.058(e)(1). Conclusion of Law No. 5 is the sanction to be applied in the case.

An agency "is not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law". *Granek v. Tex. State Board of Medical Examiners*, 172 S.W.3d 761, 781 (Tex. App. Austin 2005) The specific reason and legal basis for changing the recommended sanction in this case is a combination of factors: (1) the record reflects that Respondent and the Comptroller entered a settlement agreement and a payment agreement to fully settle Respondent's tax liability, and that Respondent is complying with those agreements; and (2) the record does not reflect any other aggravating circumstances that, in combination with Respondent's violation of Tex. Alco. Bev. Code §11.61(b)(5), justifies cancellation.

I agree with the Administrative Law Judge that the decision in *TABC v. Clubs Unlimited L.L.C. d/b/a Costa Azul* (SOAH Docket No. 458-09-1241, Feb. 13, 2009) does not stand for the proposition "that Staff may not, on its own initiative, seek cancellation of a permit where the Comptroller has entered into a settlement agreement with the permittee". Furthermore, this case does not stand for that proposition. Simply, given the record in this case, I do not believe that Respondent's permits should be cancelled.

The Findings of Fact and Conclusions of Law Nos. 1-4 that are contained in the Proposal for Decision are incorporated 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.

IT IS THEREFORE ORDERED that **NO ACTION** be taken against Respondent's Mixed Beverage Permit No. MB640701 and the associated Beverage Cartage Permit and Mixed Beverage Late Hours Permit.

This Order will become **final and enforceable** on the 12th day of April, 2013, **unless** a Motion for Rehearing is filed by the 11th day of April, 2013.

SIGNED this the 18th day of March, 2013, 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 18th day of March, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Donald B. Dailey
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, Texas 78701
VIA FACSIMILE: 512.322.2061

Tejano City Limits, L.L.P.
d/b/a Club Fuego
RESPONDENT
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VIA REGULAR MAIL AND VIA CMRRR #70120470000133005643

Jaime Cavazos
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VIA REGULAR MAIL

John W. Sedberry
ATTORNEY FOR PETITIONER
TABC Legal Division

SOAH DOCKET NUMBER 458-12-4913

TEXAS ALCOHOLIC BEVERAGE * BEFORE THE STATE OFFICE
COMMISSION, Petitioner *
*
VERSUS *
* OF
TEJANO CITY LIMITS, L.L.P., *
d/b/a CLUB FUEGO, Respondent *
*
PERMIT NUMBER MB640701, PE & LB *
BEXAR COUNTY, TEXAS * ADMINISTRATIVE HEARINGS.

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (the Commission) staff (Staff) brought this action against Tejano City Limits, L.L.P., doing business as Club Fuego (Respondent), seeking cancellation of Respondent's permits. Staff alleges Respondent was indebted to the State for mixed beverage gross receipts taxes on or about November 1, 2011. The Administrative Law Judge (ALJ) finds that Staff has proved the allegation. The ALJ concludes that cancellation of Respondent's permits is proper.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested. The hearing in this matter convened on April 25, 2012, before ALJ Donald B. Dailey at the San Antonio field office of the State Office of Administrative Hearings (SOAH). John W. Sedberry, Legal Division Attorney, represented Staff. Attorney Jaime Cavazos represented Respondent.

II. APPLICABLE LAW

Under Tex. Alco. Bev. Code § 11.61(5)(a), 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 permittee is indebted to the state for taxes imposed by Chapter 183 of the Tax Code.

Under Tex. Alco. Bev. Code § 11.64(a), when the Commission is authorized to suspend a permit, the Commission shall give the permittee the opportunity to pay a civil penalty rather than have the permit or license suspended, unless the basis for the suspension is [a number of violations not applicable to this case].

Under Tex. Alco. Bev. Code § 11.64(b) and (c), in the case of a violation of the Alcoholic Beverage Code by a permittee, the Commission may relax any provision of the code relating to the suspension or cancellation of the permit and assess a sanction the Commission finds just under the circumstances, if (1) the violation could not reasonably have been prevented by the permittee by the exercise of due diligence; (2) the permittee was entrapped; (3) an agent, servant, or employee of the permittee violated this code without the knowledge of the permittee or licensee; (4) the permittee did not knowingly violate this code; (5) the permittee has demonstrated good faith, including the taking of actions to rectify the consequences of the violation and to deter future violations; or (6) the violation was a technical one.

III. SUMMARY OF THE EVIDENCE

Respondent holds a mixed beverage permit, a beverage cartage permit, and a mixed beverage late hours permit under Permit Number MB640701 for the premises known as Club Fuego at 77503 Highway 90 West, San Antonio, Texas. On August 9, 2010, the Audit Division of the Comptroller of Public Accounts (the Comptroller) completed an audit of Respondent's mixed beverage gross receipts tax liability for the period September 1, 2006, through February 28, 2010. The Comptroller concluded that Respondent owed an additional \$273,849.81 in taxes, \$27,384.94 in penalties, and \$21,565.58 in interest, for a total of \$322,800.33. On May 6, 2011, after correcting a computational error, the Comptroller revised downwards the amount Respondent owed to \$175,342.70 in taxes, \$17,534.24 in penalties, and \$19,320.69 in interest, for a total of \$212,197.63.

On June 14, 2011, Respondent and the Comptroller entered into a settlement agreement, wherein the parties agreed that Respondent owed \$175,342.70 in taxes, \$17,534.24 in penalties, and \$19,565.69 in interest, for a total of \$212,442.63. Respondent and Comptroller entered into a

payment agreement on June 22, 2011, providing for 60 monthly payments of \$2,000.00 each by Respondent, beginning on July, 15, 2011, and providing that the Comptroller agreed to accept the foregoing payments as full settlement of Respondent's tax liability for the audit period. Through April 15, 2012, Respondent has paid \$14,000.00 under the settlement agreement, as well as frequent payments of current mixed beverage taxes. By a letter dated April 18, 2012, the Comptroller advised Mr. Cavazos that Respondent was "up to date on their installment payments and tax filings with this office."

Alfredo Alvarez, a Commission enforcement agent, testified that, in about February 2012, he became aware of Respondent's tax liability while investigating an unrelated matter. Subsequently, he provided security for Comptroller personnel when they made two cash register seizures from Respondent. He obtained documents showing that Respondent owed more than \$200,000.00, and he was aware that Respondent had entered into a payment agreement with the Comptroller.

Amanda Sarli testified that she and her spouse are each 50 percent partners in Respondent. As a result of negotiations, Respondent reached the foregoing settlement and payment agreements with the Comptroller. Also, Respondent has put up a payment bond in the amount of \$16,000.00.

IV. ARGUMENT OF THE PARTIES

Staff argued that Respondent put other permittees at a significant competitive disadvantage by not paying its taxes. Therefore, Respondent's permits should be cancelled pursuant to the Commission's obligation to "ensure fair competition within the alcoholic beverage industry," pursuant Tex. Alco. Bev. Code § 5.31(b)(3).

Respondent argues that other permittees were not put at a competitive disadvantage. While the total amount might seem large, the audit covers a period of almost 3 ½ years. In other words, the monthly amount is not significant. Also, Respondent argues that cancellation should be reserved for more serious violations than occurred in this case. In addition, Respondent claims that Staff was

required to give Respondent the option of a suspension or civil penalty pursuant to Tex. Alco. Bev. Code § 11.64(a). Further, Respondent argues, pursuant to Tex. Alco. Bev. Code § 11.64(b) and (c), Staff should not have cancelled Respondent's permit for its non-payment of taxes because Respondent's non-payment was not a knowing violation and because Respondent has demonstrated good faith by its entering into a payment agreement, being current on payments, and posting a bond.

V. ANALYSIS

No evidence, only argument, was presented as to whether or not Respondent gained any competitive advantage as a result of underpaying its mixed beverage gross receipts tax for 3 ½ years. Therefore, the ALJ declines to make a finding, one way or the other, on that basis.

Since Staff has elected cancellation in this case, Tex. Alco. Bev. Code § 11.64(a) providing that, when the Commission elects to impose a suspension, the Commission shall give the permittee the option of a civil penalty in lieu of a suspension does not apply. Further, the provisions of Tex. Alco. Bev. Code § 11.64(b) providing for relaxation of sanctions are optional, not mandatory, even if the permittee's evidence proves one or more of the criteria under Tex. Alco. Bev. Code § 11.64(c). See *TABC v. Top of the Strip*, 993 S.W.2d 242,252 (Tex. App. – San Antonio 1999).

However, the Commission's decision may not be arbitrary or capricious. That is, the Commission may not make a decision without considering a factor the Legislature directed it to consider, consider an irrelevant factor, or reach an unreasonable result. *TABC v. Top of the Strip*, at 252. Respondent presented no evidence that the Commission was a party to Respondent's agreement with the Comptroller or that the Legislature has required the Commission to give any consideration to such an installment payment agreement. Respondent has made no argument that the Commission has considered an irrelevant factor in making its decision.

It may be that other cases where cancellation has been upheld at the appellate level present more egregious violations that presented by this case. However, Respondent does not dispute that it

owes unpaid taxes. The evidence in this case indicates that the amount still owed exceeds \$100,000, which is a considerable amount of money. Therefore, the ALJ concludes that Staff's decision to cancel Respondent's permits is not unreasonable and not arbitrary or capricious. In conclusion, cancellation of Respondent's permits is proper pursuant to Tex. Alco. Bev. Code § 11.61(b).

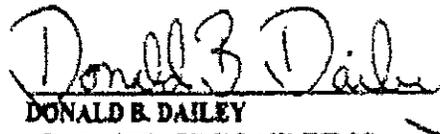
VI. FINDINGS OF FACT

1. On March 8, 2012, the Texas Alcoholic Beverage Commission (the Commission) mailed a hearing notice to Tejano City Limits, L.L.P., d/b/a Club Fuego (Respondent), notifying Respondent that a hearing would be held in this proceeding at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas.
2. The hearing notice contained a statement of the legal authority and jurisdiction for the hearing, a reference to the particular sections of the statutes and rules involved, and a short, plain statement of the matters asserted.
3. On April 25, 2012, the hearing convened before Administrative Law Judge Donald B. Dailey at SOAH in San Antonio, Texas. John W. Sedberry, Legal Division Attorney, represented TABC. Attorney Jaime Cavazos represented Respondent.
4. Respondent holds a mixed beverage permit, a beverage cartage permit, and a mixed beverage late hours permit under Permit Number MB640701 for the premises known as Club Fuego at 77503 Highway 90 West, San Antonio, Texas.
5. On August 9, 2010, the Audit Division of the Comptroller of Public Accounts (the Comptroller) completed an audit of Respondent's mixed beverage gross receipts tax liability for the period September 1, 2006, through February 28, 2010.
6. On June 14, 2011, Respondent and the Comptroller entered into a settlement agreement, wherein the parties agreed that Respondent owed \$175,342.70 in mixed beverage gross receipts taxes, \$17,534.24 in penalties, and \$19,565.69 in interest, for a total of \$212,442.63.
7. On June 22, 2011, Respondent and Comptroller entered into a payment agreement, providing for 60 monthly payments of \$2,000.00 each by Respondent, beginning on July 15, 2011, and providing that the Comptroller agreed to accept the foregoing payments as full settlement of the Respondent's tax liability for the audit period.
8. Through April 15, 2012, Respondent has paid \$14,000.00 under the settlement agreement, as well as frequent payments of current mixed beverage taxes, and was up to date on its installment payments and tax filings with the Comptroller.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code §§ 5.31, 5.33, and 5.35.
2. SOAH has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to Tex. Alco. Bev. Code §§ 5.43 and 11.015 and Tex. Gov't Code ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedures Act and Tex. Gov't Code §§ 2001.051 and 2001.052.
4. Respondent violated Tex. Alco. Bev. Code § 11.61(b)(5) by being indebted to the State for mixed beverage gross receipts taxes on or about November 1, 2011.
5. Cancellation of Respondent's permits is proper pursuant to Tex. Alco. Bev. Code § 11.61(b).

SIGNED May 16, 2012.



**DONALD B. DAILEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**