

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 23, 2015

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

VIA INTRAGENCY MAIL

RE: SOAH Docket No. 458-15-2969; *In the Matter of Chetter Hospitality Group LLC, d/b/a PHD*

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 black ink, appearing to read "Jerry Van Hamme", written over a horizontal line.

Jerry Van Hamme
Administrative Law Judge

JVH/me
Enclosure

Xc: Edgar M. Korzeniowski, Staff Attorney, Texas Alcoholic Beverage Commission, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, Texas 78731-**VIA REGULAR MAIL**
Timothy Griffith, Attorney at Law, 101 E. Park Blvd., Suite 600, Plano, Texas 75074-**VIA REGULAR MAIL**

DOCKET NO. 458-15-2969

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
v.	§	
	§	
CHETTER HOSPITALITY GROUP LLC,	§	OF
D/B/A PHD,	§	
Respondent	§	
	§	
(TABC CASE NO. 628617)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (Commission) Staff (Staff) brought this action against Chetter Hospitality Group LLC, d/b/a PHD (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 Mixed Beverage Late Hours 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 May 29, 2015, a public hearing was held before Jerry Van Hamme, ALJ, at the State Office of Administrative Hearings (SOAH), 6333 Forest Park Road, Dallas, Texas. Staff was represented by Edgar Korzeniowski, attorney. Respondent was represented by Staci Johnson, attorney. The record was 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

When the Commission is authorized to suspend a permit or license under the Code, the Commission shall, except under certain circumstances not applicable herein, give the permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended. In cases in which a civil penalty is assessed, the Commission shall determine the amount of the penalty.⁴

In the case of a violation of the Code by a permittee or licensee, the Commission may relax any provision of the Code relating to the suspension or cancellation of the permit or license and assess a sanction the Commission finds just under the circumstances, and the Commission may reinstate the license or permit at any time during the period of suspension on payment by the permittee or licensee of a fee of not less than \$75 nor more than \$500 if the Commission finds that the permittee or licensee did not knowingly violate the code; has demonstrated good faith, including

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

² Code § 28.18(d).

³ Code § 11.61(b)(2).

⁴ Code § 11.64(a).

the taking of actions to rectify the consequences of the violation and to deter future violations; or the violation was a technical one.⁵

III. EVIDENCE

A. Petitioner's Evidence

On October 5, 2012, the Commission issued a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and a Mixed Beverage Late Hours Permit to Chetter Hospitality Group LLC, d/b/a PHD, 1300 W. Davis Street, Dallas, Dallas County, Texas (Respondent).⁶ On September 23, 2014, Respondent filed an application for a two-year-renewal of its Mixed Beverage Permit with Food and Beverage Certificate and Mixed Beverage Restaurant with Food and Beverage Certificate.⁷ Respondent stated in its renewal application that it had \$500,000.00 in alcoholic beverage sales the previous year of its operation and \$600,000.00 in food sales.⁸ According to Respondent's application, alcoholic beverage sales were less than 50 percent of total gross sales for the previous year.

By letter dated October 13, 2014, Staff informed Respondent that sales information provided to Staff by the Comptroller showed that Respondent's actual alcoholic beverage sales for the previous year were \$517,873.00 and other sales were \$370,866.00. According to the Comptroller, Respondent's alcoholic beverage sales were 58.2705 percent of total gross sales. Staff, therefore, informed Respondent that the gross receipts for mixed beverages were greater than 50 percent of the total gross receipts and that Respondent did not qualify for a food and beverage certificate.⁹ Staff informed Respondent by letter dated November 6, 2014, that Respondent's renewal application had

⁵ Code § 11.64 (b) and (c)(4), (5) and (6).

⁶ Pet. Ex. 1 at 1.

⁷ Pet. Ex. 1 at 19.

⁸ Pet. Ex. 1 at 20.

⁹ Pet. Ex. 1 at 18.

been denied.¹⁰

Patrick Ramirez, a senior tax auditor for the Comptroller, testified that he personally examined sales data submitted to the Comptroller by Respondent for August 2013 through July 2014 and determined that the average alcoholic beverage sales at Respondent's premises was 58.2705 percent of total gross sales.¹¹ He also examined sales data submitted to the Comptroller by Respondent for September 2012 through April 2015 and determined that the average alcoholic beverage sales at Respondent's premises for this period constituted 56.8127 percent of total gross sales.¹² According to his calculations, alcoholic beverage sales for September 2012 through April 2015 were less than 50 percent of gross sales for only two months: *i.e.* October 2012 and April 2015. He further testified that he determined the total value of alcoholic beverage sales for each month by adding the value of complementary drinks to the alcoholic beverage sales.

B. Respondent's Evidence

Eric Tschetter, owner of PHD, testified that he has 20 years' experience working with Commission permits. He testified that he prepared Respondent's financial reports that were sent to the Comptroller. He also testified that Staff never warned him during the more than two years of the applicable permit period that alcoholic beverage sales were greater than 50 percent of total sales and that the percentages were out of compliance. Upon being notified, he made changes to the menu and raised food prices to increase the percentage of food sales *vis-a-vis* alcoholic beverage sales.¹³

Mr. Tschetter also testified that he believed some of the Comptroller's calculations of alcoholic beverage sales were wrong. He suggested that correcting those mistakes might show that alcoholic beverage sales were either less than 50 percent of gross sales for more months than alleged

¹⁰ Pet. Ex. 1 at 14-15.

¹¹ Pet. Ex. 1 at 21.

¹² Pet. Ex. 4

¹³ Tr. at 1:14:00

by Staff or that for those months where alcoholic beverage sales were in excess of the 50 percent limit the sales were not as far over the 50 percent limit as Staff alleged. However, he testified that he was not sure what the correct numbers should be.

Mr. Tschetter agreed with Staff that alcoholic beverage sales did, in fact, exceed 50 percent of gross sales for every month from June 30, 2014 through February 28, 2015, but argued that the ratio was exceeded by no more than 59.99 percent in any given month and that the percentage of alcoholic beverage sales had actually fallen below 50 percent in March and April of 2015.¹⁴ He testified that this showed he had successfully reduced the percentage of alcoholic beverage sales *vis-à-vis* total sales and was, therefore, now in compliance with the Commission requirements.

IV. ANALYSIS

The Comptroller's calculations show that from November 2012 through February 2015 Respondent's average gross receipts for mixed beverages were greater than 50 percent of total gross receipts. Although Petitioner argued that the Comptroller's calculations should not be considered accurate, the reliability of the calculations was not rebutted. Accordingly, the evidence supports Staff's contention that Respondent consistently violated Code § 28.18(a) for more than two years.

Respondent argues that refusing to renew its application is not the appropriate sanction in this matter. As Respondent noted, the Commission may relax any provision of the Code relating to the suspension or cancellation of the permit and assess a sanction instead,¹⁵ which may include giving Respondent the opportunity to pay a civil penalty rather than having the permit suspended.¹⁶ Staff, however, argues that these Code provisions are limited solely to sanctions related to suspensions or cancellations of a permit, not, as in the instant case, to the non-renewal of a permit and that where, as here, the Comptroller does not certify that the permit holder is in compliance with the required sales

¹⁴ Resp. Ex. 13.

¹⁵ Code §§ 11.64 (b) and (c)(4), (5) and (6).

¹⁶ Code § 11.64(a).

percentages, the Commission may not, pursuant to Code § 28.18(d), renew the certificate. Staff further argues that although Respondent may now be in substantial compliance with the statute, such *post hoc* compliance does not vitiate the previous violations nor obligate Staff to ignore approximately two and one-half years of consistent noncompliance.

The evidence shows that the Comptroller did not certify that Respondent was in compliance with the required sales percentages. As such, the Commission is authorized to not renew Respondent's certificate.¹⁷ Respondent presented no evidence showing that Staff was obligated to ignore the provisions of Code § 28.18(d) or that any other Code provisions take precedence. Accordingly, based on the evidence in the record, Staff has shown that Respondent does not qualify for renewal of its Mixed Beverage Restaurant Permit with Food and Beverage certificate and Mixed Beverage Late Hours Permit. The Commission may, therefore, deny the renewal of Respondent's permit.¹⁸

V. FINDINGS OF FACT

1. On October 5, 2012, the Texas Alcoholic Beverage Commission (Commission) issued a Mixed Beverage Restaurant Permit with Food and Beverage Certificate and a Mixed Beverage Late Hours Permit to Chetter Hospitality Group LLC, d/b/a PHD, 1300 W. Davis Street, Dallas, Dallas County, Texas (Respondent).
2. On September 23, 2014, Respondent filed an Application for a Two-Year Renewal of Mixed Beverage Permit with Food and Beverage Certificate and Mixed Beverage Restaurant with Food and Beverage Certificate (application).
3. Respondent stated in its application that the sales data for the last year of its operation showed \$500,000.00 in alcoholic beverage sales and \$600,000.00 in food sales.
4. By letter dated October 13, 2014, the Commission staff (Staff) informed Respondent that sales information provided by the Comptroller of Public Accounts (Comptroller) showed that Respondent had \$517,873.00 in alcoholic beverage sales for its last year of operation and \$370,866.00 in other sales. Alcoholic beverage sales were 58.2705 percent of total gross

¹⁷ Code § 28.18(d)

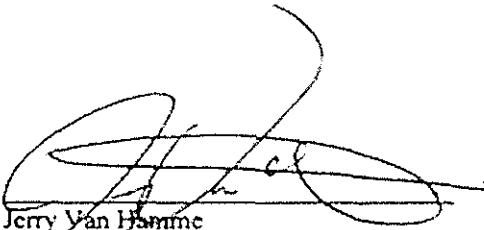
¹⁸ Code § 28.18(d).

- sales. Staff informed Respondent that it did not qualify for a food and beverage certificate.
5. By letter dated November 6, 2014, Staff informed Respondent that its application for a Two-Year Renewal of Mixed Beverage Permit with Food and Beverage Certificate and Mixed Beverage Restaurant with Food and Beverage Certificate had been denied. On November 25, 2014, Respondent filed a Motion for Rehearing or 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. The alcoholic beverage sales at Respondent's licensed premises from September 2012 through April 2015 averaged 56.8127% of total gross sales.
 8. The alcoholic beverage sales for Respondent's licensed premises were in excess of 50 percent of total gross sales every month from November 2012 through March 2015.
 9. 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.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of Chapter 5 and § 6.01.
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 Tex. Gov't Code ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. Respondent failed to qualify to hold a mixed beverage permit because the gross receipts of mixed beverages sold at Respondent's premises exceeded 50 percent of its total gross receipts. Tex. Alco. Bev. Code § 28.18(a).
5. Respondent's permit renewal application may be denied. Tex. Alco. Bev. Code § 28.18(d).

SIGNED July 23, 2015.



Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings

State Office of Administrative Hearings

6333 Forest Park Road Suite 150A
Dallas, Texas 75235



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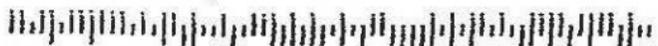


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EDGAR M. KORZENIOWSKI
TEXAS ALCOHOLIC BEVERAGE COMMISSION
2225 E. RANDOLL MILL SUITE 200
ARLINGTON, TX 76011

76011635450



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 are **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

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

Chetter Hospitality Group, LLC
d/b/a PHD

RESPONDENT

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Dallas, TX 75208

VIA FIRST CLASS MAIL, CMRRR # 70150640000460343290

Timothy Griffith

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Edgar Korzeniowski

ATTORNEY FOR PETITIONER

TABC Legal Division

VIA E-MAIL: edgar.korzeniowski@tabc.texas.gov

DOCKET NO. 628617

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
CHETTER HOSPITALITY GROUP LLC D/B/A PHD, Respondent	§	ALCOHOLIC
	§	
	§	
	§	
PERMIT RM821285, LB, FB	§	
	§	
	§	
DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-15-2969)	§	BEVERAGE COMMISSION

ORDER DENYING MOTION FOR REHEARING

CAME ON FOR CONSIDERATION this 12th day of February, 2016, 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 Jerry Van Hamme presiding. The hearing convened on May 29, 2015 and the SOAH record closed the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on July 23, 2015. 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. Respondent filed Exceptions to the Proposal for Decision on August 7, 2015. Petitioner filed a Response to Respondent's Exceptions on August 12, 2015. Respondent filed a Response to Petitioner's Reply to Exceptions on August 13, 2015. The Administrative Law Judge filed a letter on September 8, 2015 saying that the Proposal for Decision as originally issued should not be amended.

After review and due consideration of the Proposal for Decision, on December 30, 2015, I issued an Order adopting the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and denying Respondent's renewal application for the above permits and certificate.

On January 15, 2016, Respondent filed a Motion for Rehearing asserting that the Commission is bound [by an undated October, 2006 Order Modifying Proposal for Decision in *In Re Rajesh Patel* (TABC Docket No. 602798, SOAH Docket No. 458-05-7391)] to consider certain mitigating circumstances set forth in Alcoholic Beverage Code §11.64(c) in applying Alcoholic Beverage Code §11.64(b) to a renewal application. In its second point, Respondent asserts that the Commission does not have the legal authority to cancel a primary permit for non-compliance with the requirements of a secondary permit.

On January 20, 2016, Petitioner filed a Response to Respondent's Motion for Rehearing. Petitioner asserts that by the plain language of Alcoholic Beverage Code §11.64(b) the section applies to suspensions and cancellations (which are disciplinary actions) and not to renewals (where the issue is whether the qualifications to hold the permit are met). Petitioner also asserts that the January 8, 2008 Order adopting the Findings of Fact and Conclusions of Law in the Proposal for Decision in *Texas Alcoholic Beverage Commission v. Alicia Guerra Velasquez* (TABC Docket No. 553805, SOAH Docket No. 458-07-3589) "implicitly overruled" the *Patel* Order. In the *Velasquez* Proposal for Decision, the Administrative Law Judge states: "The issues addressed in §11.64 are relevant in situations of suspension or cancellation of permits or licenses. They are not to be considered when determining eligibility for renewal." Further, in response to Respondent's second issue regarding cancellation of a primary permit where the secondary permit is no longer in compliance, Petitioner notes that Respondent holds an RM¹ permit and not a stand-alone MB² permit.

I believe that the Administrative Law Judge in the more recent *Velasquez* Order accurately states the law regarding the applicability of the mitigating circumstances in Alcoholic Beverage Code §11.64 to renewal applications. To apply Alcoholic Beverage Code §11.64(b) (and the factors listed in §11.64(c)) would in effect be waiving the statutory qualifications for a permit, which I cannot do. If there are conflicting precedents regarding how the Commission has applied the law in the past, it cannot be considered arbitrary to be consistent with the precedent that hews strictly to the plain language of the Alcoholic Beverage Code.

As to Respondent's second point, it is true that lacking the qualifications of a "secondary" permit generally should not result in denial of the primary permit; but it is not true as regards an RM permit. Although it is not specifically mentioned in the Alcoholic Beverage Code, the RM designation is used by the Commission to distinguish permits in areas where voters under Election Code §501.035(b)(9) have approved the "legal sale of mixed beverages in restaurants by food and beverage certificate holders *only*" [emphasis added]. Thus, failing to qualify for a Food

¹ The permit at issue in this case (No. RM821285) is identified on its face as a "Mixed Beverage Restaurant Permit with FB", where "FB" stands for "Food and Beverage Certificate".

² Mixed Beverage Permit.

and Beverage Certificate in those areas means that continued sale of alcohol would not be authorized because the area is not "wet" for an MB without a Food and Beverage Certificate.

If a permittee was issued both an MB permit and a Food and Beverage Certificate but subsequently failed to meet the qualifications for the Food and Beverage Certificate, then it would fall under the general rule: the renewal of the "secondary" FB would be denied but the "primary" MB would not be denied solely on that basis. The significance of the RM designation undermines Respondent's second argument. The fact is, Respondent holds an RM Permit and not an MB permit. The Food and Beverage Certificate is an integral part of the RM permit. If Respondent no longer qualifies for the Food and Beverage Certificate, it no longer qualifies for the RM. Removing the Food and Beverage Certificate from the RM does not automatically convert the RM to an MB, which in any event is not authorized under the local option ordinances for the area in question..

Having considered the Proposal for Decision, Respondent's Motion for Rehearing and Petitioner's Response to Respondent's Motion for Rehearing, Respondent's Motion for Rehearing is **DENIED**.

IT IS THEREFORE ORDERED that Respondent's application for renewal of the above permits and certificate is **DENIED**.

SIGNED this the 12th day of February, 2016, 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 12th day of February, 2016.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Jerry Van Hamme
ADMINISTRATIVE LAW JUDGE
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