

DOCKET NO. 458-03-2444

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

BEFORE THE STATE OFFICE

V.

JBS ENTERPRISES, INC.  
D/B/A J & J OYSTER BAR  
TARRANT COUNTY, TEXAS  
(TABC CASE NO. 603169)

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OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission staff (Staff) brought this disciplinary action against JBS Enterprises d/b/a J & J Oyster Bar (Respondent), alleging that on or about December 12, 2002, Respondent, its agent, servant, or employee erected or permitted the erection of an outdoor advertising sign on the licensed premises displaying the brand name of an alcoholic beverage, to wit "Miller Light." Staff requested that Respondent's licenses be suspended for three days or that Respondent be ordered to pay a civil penalty of \$1,800 in lieu of suspension. The Administrative Law Judge (ALJ) finds that Respondent or its agent, servant, or employee erected or permitted the erection of an outdoor advertising sign on the licensed premises displaying the brand name of an alcoholic beverage, but recommends that Respondent's permit be suspended for three days or that Respondent be ordered to pay a civil penalty of \$1,050 in lieu of suspension.<sup>1</sup>

**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 April 10, 2003, a hearing was held before Jerry Van Hamme, ALJ, State Office of Administrative Hearings, at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. Staff was represented by Timothy Griffith, attorney. Respondent appeared *pro se*. The record was

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<sup>1</sup>The civil penalty in this case was, apparently, derived from the testimony of Mr. Schusler, the owner of Respondent's establishment, who, during the hearing, was asked to estimate the amount of daily gross alcoholic beverage sales made at Respondent's establishment. That figure was then multiplied by three (to correspond with the proposed three day suspension) to reach the amount of the proposed monetary penalty. However, since Mr. Schusler was not prepared to provide a definitive answer to that question at the hearing, and that the answer given by Mr. Schusler was not necessarily more than a rough estimate, the ALJ does not feel constrained to hold Mr. Schusler to that estimate or to the corresponding civil penalty derived from it. Based on the facts in this case, the ALJ recommends the civil penalty as set forth above.



closed on that date.

## II. LEGAL STANDARD AND APPLICABLE LAW

A wine and beer retailer may erect or maintain one sign at each place of business which may read "Beer," "Beer and Wine," or "Beer, Wine and Ale." TEX. ALCO. BEV. CODE ANN. § 108.52(c)(3).

A sign erected under TEX. ALCO. BEV. CODE ANN. § 108.52(c) may be placed inside or outside the place of business so as to be visible to the general public. None of the letters on a sign may be more than 12 inches in height, and no sign may contain any wording, insignia, or device representative of the brand or name of an alcoholic beverage. TEX. ALCO. BEV. CODE ANN. § 108.52(d).

The provisions of the Code applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit. TEX. ALCO. BEV. CODE ANN. § 25.04(b).

The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on-premise license if it is found, after notice and hearing, that the licensee violated a provision of the Texas Alcoholic Beverage Code (Code) or a rule of the Commission during the existence of the license sought to be canceled or suspended or during the immediately preceding license period. TEX. ALCO. BEV. CODE ANN. § 61.71(a)(1).

## III. EVIDENCE

### 1. Staff's Evidence and Contentions

Brent Hardtner, a Commission Agent, testified that on July 4, 2002, he observed a banner in Respondent's parking lot advertising Budweiser beer. In Agent Hardtner's opinion, this banner violated TEX. ALCO. BEV. CODE ANN. § 108.52(d), which prohibits signs displaying the brand or name of an alcoholic beverage. He gave a warning to the manager of Respondent's establishment about the violation.

On December 12, 2002, Agent Hardtner observed another banner in Respondent's parking lot, this time advertising Miller Light beer. This banner was, again, in Agent Hardtner's opinion, in violation of TEX. ALCO. BEV. CODE ANN. § 108.52(d). The same manager who was present at Respondent's establishment in July was the manager present in December. Disciplinary action was initiated by Staff concerning this December violation.

### 2. Respondent's Evidence and Contentions

Jim Schusler, the owner of Respondent establishment, testified that when the Commission agent arrived in December, the agent first complained to Respondent's manager that the Miller Light banner violated the Code because it advertised prices. The agent, according to Mr. Schusler, did not

complain at that time about the Miller Light brand and name being on the banner. Mr. Schusler accordingly had the prices on the banner painted over. He testified that the agent returned and then, for the first time, complained about the Miller Light brand and name being on the banner. Mr. Schusler testified that once he was made aware of that violation, he had the Miller Light name on the banner painted over, too.

He further testified that every time the agent informed him of a problem he immediately took steps to correct it, and if the agent had told him that the name and brand on the banner was a problem, he would have painted over it when he painted over the prices. The only reason this matter had progressed to a disciplinary hearing, in Mr. Schusler's opinion, was because the agent did not give Mr. Schusler a chance to correct all the problems at the beginning.

Mr. Schusler further testified that he opened his first establishment thirty years ago, and that in those thirty years he has had only two disciplinary actions taken against him by the Commission. He testified that he takes great pains to abide by the Code and Commission rules, and believes, given his exemplary record and the agent's failure to adequately warn him of the brand and name problem, that Staff's requested three-day suspension or \$1,800 civil penalty is excessive and unreasonable.

#### IV. ANALYSIS

Both Respondent and Staff agree that Respondent violated TEX. ALCO. BEV. CODE ANN. § 108.52(d) by advertising the Miller Light brand and name on its banner. Respondent did not dispute this allegation or present evidence to rebut it. The only point of disagreement between the parties is the proposed discipline. Respondent argues that every effort was made to meet the demands of the Commission's agent when the agent first contacted Respondent's manager in December, but that the agent did not complain about the brand and the name on the sign at that time. Had the agent been more forthcoming, Respondent would have corrected the problem—just as Respondent had corrected the problem related to the prices being advertised—and therefore have obviated the need for this hearing. Given Respondent's willingness and manifest desire to accede to the agent's demands, Respondent argues that the discipline requested by Staff in this case is too severe.

This particular violation (TEX. ALCO. BEV. CODE ANN. § 108.52(d)) does not appear in the standard penalty chart, and therefore lacks a suggested regulatory penalty. 16 TEX ADMIN CODE § 37.60. Accordingly, the determination of the appropriate penalty shall be based on the facts of the immediate case.

Respondent has an obligation to know and abide by the provisions of the Code, and is accountable for failing to meet this obligation. This obligation exists whether Respondent is warned by a Commission agent of the violation and given a chance to correct it, or not.

This obligation is all the more incumbent upon Respondent where, as here, Respondent was warned of this identical infraction earlier in July. For Respondent, and particularly Respondent's manager, to commit the same infraction a mere six months later, and then to argue that Respondent deserved yet another warning before being disciplined, is not persuasive.

As for the nature of the discipline, the fact that Respondent had so recently committed the same offense and had at that time been warned accordingly may be taken into account in determining the appropriate discipline in the instant case.

## V. RECOMMENDATION

Because Respondent knew, or certainly should have known, about the prohibitions concerning outdoor advertising, and because Respondent was recently warned concerning that identical violation, the ALJ recommends that Respondent's licenses be suspended for three days or that Respondent be ordered to pay a civil penalty of \$1,050 in lieu of suspension.

## FINDINGS OF FACT

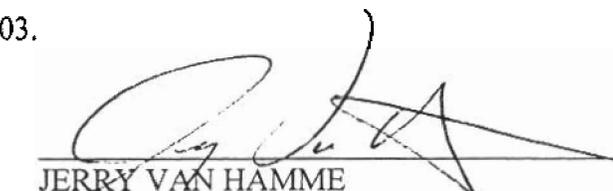
1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, JBS Enterprises d/b/a J & J Oyster Bar, 612 University Drive, Fort Worth, Tarrant County, Texas, holds a Wine and Beer Retailer's Permit, BG-305899, issued by the Commission on March 20, 1995.
3. On July 4, 2002, Respondent displayed a banner in its parking lot advertising Budweiser beer. Agent Hardtner, an agent for the Commission, warned the manager of Respondent's establishment that this banner violated outdoor advertising prohibitions because it displayed the brand or name of an alcoholic beverage.
4. On December 12, 2002, Respondent displayed a banner in Respondent's parking lot advertising Miller Light beer and accompanying prices. The same manager who was present at Respondent's establishment in July 2002, was the manager present at Respondent's establishment in December 2002.
5. Agent Hardtner warned Respondent that this banner violated outdoor advertising prohibitions because it advertised prices on the banner. Respondent corrected the problem by having the prices on the banner painted over.
6. Agent Hardtner also informed Respondent that this banner violated outdoor advertising prohibitions because it displayed the brand or name of an alcoholic beverage.
7. The Commission instituted disciplinary action against Respondent, alleging that on or about December 12, 2002, Respondent, its agent, servant, or employee erected or permitted the erection of an outdoor advertising sign on the licensed premises displaying the brand name of an alcoholic beverage, to wit "Miller Light."
8. On April 10, 2003, a hearing was held at the State Office of Administrative Hearings, Dallas,

Dallas County, Texas. Staff was represented by its attorney Timothy Griffith. Respondent appeared *pro se*. The record was closed on that date.

### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Subchapter B of ch. 5, §§ 6.01 and 11.61. 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, under TEX. GOV'T CODE ANN. § 2003.021.
2. Based on Finding of Fact No. 4, Respondent erected a sign at its place of business containing wording, an insignia, or device representative of the brand or name of an alcoholic beverage in violation of TEX. ALCO. BEV. CODE ANN. § 108.52(c)(3) and (d).
3. Based on Conclusion of Law No. 2, Respondent's Wine and Beer Retailer's Permit may be suspended. TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 25.04(b).
4. Based on the foregoing findings and conclusions, the Commission is warranted in suspending Respondent's permit for three days or in ordering that Respondent pay a civil penalty of \$1,050 in lieu of suspension.

SIGNED this 2 day of May, 2003.

  
JERRY VAN HAMME  
Administrative Law Judge  
State Office of Administrative Hearings

**DOCKET NO. 603169**

IN RE JBS ENTERPRISES INC.	§	BEFORE THE
D/B/A J & J OYSTER BAR	§	
PERMIT NO. BG305899	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2444)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 27th day of May 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on April 10, 2003, and adjourned on April 10, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 2, 2003. This Proposal For Decision (attached hereto as Exhibit "A"), 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 Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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.

**IT IS THEREFORE ORDERED**, by the Assistant 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 Permit No. BG305899 is hereby **SUSPENDED for three (3) days**.

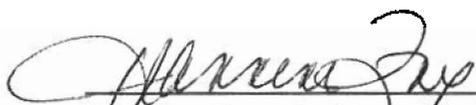
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$1,050.00 on or before the 9th day of July, 2003, all rights and privileges under the above described permit will be **SUSPENDED for a period of three (3) days, beginning at 12:01 A.M. on the 16th day of July, 2003**.

**This Order will become final and enforceable on June 13, 2003, unless a Motion for Rehearing is filed before that date.**

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

**SIGNED** this 27th day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

/bc

The Honorable Jerry Van Hamme  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FAX (214) 956-8611

JBS ENTERPRISES INC.  
D/B/A J & J OYSTER BAR  
**RESPONDENT**  
1304 Blair  
Mesquite, TX 75150-4223  
**CERTIFIED MAIL NO. 7001 2510 0003 8688 8258**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Regulatory Division

Fort Worth District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 603169**

**REGISTER NUMBER:**

**NAME: JBS ENTERPRISES INC.**

**TRADENAME: J & J OYSTER BAR**

**ADDRESS: 612 University Drive, Fort Worth, Tarrant County, Texas 76107-2138**

**DATE DUE: July 9, 2003**

**PERMITS OR LICENSES: BG305899**

**AMOUNT OF PENALTY: \$1,050.00**

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Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 9TH DAY OF JULY 2003, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
P.O. Box 13127  
Austin, Texas 78711**

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address                      P.O. Box No.

\_\_\_\_\_  
City                      State                      Zip Code

\_\_\_\_\_  
Area Code/Telephone No.