

DOCKET NO. 458-03-4669

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
	§	
V.	§	
	§	
CARMEN MARTINEZ	§	OF
D/B/A SOLIS ICE & GROCERY	§	
PERMIT NO. BQ-450866	§	
BEXAR COUNTY, TEXAS	§	
(TABC CASE NO. 601536)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Carmen Martinez, d/b/a Solis Ice & Grocery (the Permittee) for paying for beer with a check for which funds were insufficient. The Permittee appeared at the hearing and represented herself. The Staff recommended that Permittee's permits be suspended for ten days or that Permittee pay a fine of \$1,500.00 in lieu of suspension.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened on January 27, 2004, before ALJ Cyrena Benson, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by attorney Gayle Gordon, who appeared by telephone. The Permittee also appeared by telephone and represented herself at the hearing. The record was closed on January 30, 2004, after the receipt of additional evidence.

The Texas Alcoholic Beverage Commission (the Commission) and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the Conclusions of Law. The notice of intention to institute an enforcement action and the notice of the hearing met the notice requirements imposed by statute and by rule as set forth in the Findings of Fact and Conclusions of Law.

II. ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS

The allegations in this proceeding asserted the Permittee, its agent, or employee paid beer distributors for beer with checks on June 20, 2002, September 13, 2002, September 14, 2002, and September 19, 2003, that were subsequently returned for insufficient funds. It is a violation of TEX. ALCO. BEV. CODE ANN. (the Code) § 61.73(b) for a permittee to tender a beer distributor a check for payment of beer which is dishonored when presented for payment. Such a violation may be punished

by cancellation or a maximum 60-day suspension of a permit.

III. SUMMARY OF THE EVIDENCE

TABC introduced sufficient and undisputed evidence of the dishonored checks written to BudCo, Ltd. and Halo Distributing Company and accompanying affidavits. Ms. Martinez did not dispute the evidence, but testified that her Bank made an error on several occasions.

Ms. Martinez testified that on two of the checks, she had made a cash deposit at the bank, and the bank had failed to note the deposit. She went back to the bank to remedy the situation. She further stated, that after that incident, the bank manager wrote a letter acknowledging the error. She testified that she was only three dollars short on the September 19, 2003 check. Ms. Martinez asked for time to look for the letters from the bank and wanted to submit them as evidence. Ms. Gordon did not have any objection to the court considering any letters sent in by Ms. Martinez. Ms. Martinez faxed a letter to the court written by Thomas Bochniak, Banking Manager for the Central Park location of Compass Bank. The letter stated that Ms. Martinez had deposited funds into the Solis Ice & Grocery account to cover check #1135, and the funds were not properly credited to the account.

IV. RECOMMENDATION

Penalties for violations of the Code § 61.73(b) may be determined in accordance with the Commission's standard penalty chart found at 16 TEX. ADMIN. CODE § 37.60. The penalty chart prescribes suspensions of varying lengths, depending on a permittee's history of violations.

Ms. Martinez in no way contested the fact that on four separate occasions checks were dishonored. The letter sent in by Ms. Martinez established that on one occasion Compass Bank failed to credit a deposit to her account. The bank's error resulted in the June 20, 2002, check being dishonored. There is no evidence that refutes the three other checks that were dishonored.

In this case, Staff recommended a ten-day suspension based a prior cash law violation and the four violations alleged in the present Notice of Hearing. The ALJ believes that Ms. Martinez has an affirmative defense to the June 20, 2002 allegations, but not as to the checks written on September 13, 2002, September 14, 2002, and September 19, 2003. The ALJ, therefore, recommends a ten-day suspension. Pursuant to the Code § 11.64, the Permittee must be offered the opportunity to pay a civil penalty in lieu of a suspension. The penalty may not be less than \$150.00 nor more than \$25,000.00 for each day of the suspension. Staff recommended the minimum amount be used to determine the civil penalty, and the ALJ agrees with Staff's recommendation.

V. FINDINGS OF FACT

1. Carmen Martinez d/b/a Solis Ice & Grocery (the Permittee) holds Permit No. BQ450866 for the premises located at 22401 Hwy 16 South, Von Ormy, Bexar County, Texas 78073.
2. Permittee received proper and timely notice of the hearing from the staff of the Texas Alcoholic Beverage Commission (Staff) in a notice of hearing, dated September 30, 2003. The notice was properly sent to Permittee at the address provided in Finding of Fact No. 1.

3. 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.
4. The hearing was convened on January 27, 2004, at 10:00 a.m. at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Permittee represented herself at the hearing. Attorney Gayle Gordon represented the Staff.
5. On or about June 20, 2002, Permittee, its agent, servant, or employee tendered a check written in the amount of \$187.50 to BudCo Ltd., of San Antonio, Texas. On or about June 26, 2002, the check was returned by Drawee, Compass Bank, of San Antonio, Texas for insufficient funds.
6. On or about September 13, 2002, Permittee, its agent, servant, or employee tendered a check written in the amount of \$959.38 to BudCo Ltd., of San Antonio, Texas. On or about September 23, 2002, the check was returned by Drawee, Compass Bank, of San Antonio, Texas for insufficient funds.
7. On or about September 14, 2002, Permittee, its agent, servant, or employee tendered a check written in the amount of \$314.15 to BudCo Ltd., of San Antonio, Texas. On or about September 27, 2002, the check was returned by Drawee, Compass Bank, of San Antonio, Texas for insufficient funds.
8. On or about September 19, 2003, Permittee, its agent, servant, or employee tendered a check written in the amount of \$430.05 to Halo Distributing Company, of San Antonio, Texas. On or about September 23, 2003, the check was returned by Drawee, International Bank of Commerce, of San Antonio, Texas for insufficient funds.
9. Compass Bank failed to credit a deposit to Ms. Martinez's account. As a result of the bank's error, the June 20, 2002 check was dishonored.

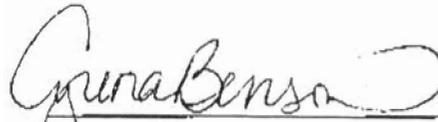
VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61, and 61.73.
2. The State Office of Administrative Hearings 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 ANN. § 5.43 and TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55(d).
4. The Permittee, its agent, servant, or employee tendered checks in payment for beer, on

September 13, 2002, September 14, 2002, and September 19, 2003, which were dishonored for insufficient funds when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. § 61.73(b).

5. Based on the foregoing Findings and Conclusions, a ten-day suspension of the permits is warranted pursuant to 16 TEX. ADMIN. CODE § 37.60.
6. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Permittee should be allowed to pay a \$1,500.00 civil penalty in lieu of suspension of its permits.

SIGNED this 23rd day of February, 2004.



Cyrena Benson
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 601536

IN RE CARMEN MARTINEZ
D/B/A SOLIS ICE & GROCERY
PERMIT NO. BQ 450866

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BEFORE THE TEXAS

ALCOHOLIC

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-03-4669)

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 5th day of April, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Cyrena Benson. The hearing convened on January 27, 2004 and adjourned on January 30, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 23, 2004. This 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. 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. BQ450866 is herein **SUSPENDED**.

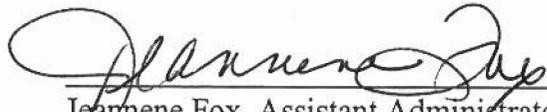
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$1,500.00 on or before the 2nd day of June, 2004, all rights and privileges under the above described permit will be **SUSPENDED** for a period of ten (10) days, beginning at 12:01 A.M. on the 9th day of June, 2004.

This Order will become final and enforceable on APRIL 19, 2004, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties as indicated below.

SIGNED on this the 5th day of April, 2004.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/vr

The Honorable Cyrena Benson
Administrative Law Judge
State Office of Administrative Hearings
San Antonio, Texas
VIA FACSIMILE (210) 308-6854

Carmen Martinez
RESPONDENT
d/b/a Solis Ice & Grocery
22401 Hwy. 16S
Von Orney, TX 78073
CERTIFIED MAIL NO. 7000 1530 0003 1903 3807

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Compliance Division
Licensing Division
San Antonio District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 601536

REGISTER NUMBER:

NAME: Carmen Martinez

TRADENAME: Solis Ice & Grocery

ADDRESS: 22401 Hwy. 16S, Von Orney, Texas, 78073

DATE DUE: June 2, 2004

PERMITS OR LICENSES: BQ450866

AMOUNT OF PENALTY: \$1,500.00

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 2ND DAY OF JUNE, 2004, 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.