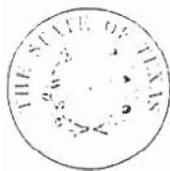


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 4, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

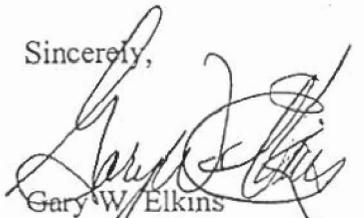
RE: Docket No. 458-98-1983; Texas Alcoholic Beverage Commission vs. Monticello III Group, Inc.
dba Carlsbad Tavern Permit Nos. MB-401140 & LB-401141; TABC Case No. 580244

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Dewey Brackin, Assistant Attorney General representing the Texas Alcoholic Beverage Commission, and to Robert Palmer, Attorney representing Respondent. For reasons discussed in the proposal, this proposal finds the allegation to be proven, it recommends a lesser penalty of a ten-day permit suspension or a civil penalty of \$1,500.00 in lieu of suspension.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,



Gary W. Elkins
Administrative Law Judge

GWE:dc
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **HAND DELIVERY**
Andrew del Cueto, Assistant Attorney General, Texas Alcoholic Beverage Commission - **HAND DELIVERY**
Robert Palmer, Attorney at Law, 11407 W. Ave., San Antonio, Texas 78213 - **CERTIFIED MAIL NO. Z 579 479**
339, RETURN RECEIPT REQUESTED

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

DOCKET NO. 458-98-1983

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
	§	
V.	§	
	§	
MONTICELLO III GROUP, INC.	§	OF
D/B/A CARLSBAD TAVERN	§	
PERMIT NOS. MB-401140 & LB-401141	§	
BEXAR COUNTY, TEXAS	§	
(TABC CASE NO. 580244)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Commission) brought this enforcement action against Monticello III Group, Inc. dba Carlsbad Tavern (Respondent) for purchasing beer from a distributor with a check for which the underlying funds were insufficient. Staff requested that Respondent be assessed a thirty-day suspension of its permits with the option of paying a penalty of \$4,500 in lieu of suspension. Although this Proposal for Decision finds the allegation to be proven, it recommends a lesser penalty of a ten-day permit suspension or a civil penalty of \$1,500 in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §§ 6.01, 61.71, and 61.73 (Vernon 1998).

On June 15, 1998, Staff mailed to Respondent via certified mail a notice of hearing informing Respondent of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted by Staff. The notice was received by Respondent.

The hearing in this matter originally convened before the undersigned administrative law judge (ALJ) on December 14, 1998, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by its counsel, Dewey Brackin. Respondent was represented by Robert Palmer, a corporate officer of Respondent. Prior to the presentation of evidence, the parties informed the ALJ that they had reached a settlement. As a result, the parties announced the terms of settlement on the record and requested that the hearing be continued without resetting pending finalization of the settlement. The request was granted.

On February 26, 1999, the ALJ issued an order requesting either a status report or a motion to dismiss the case. In response, Staff filed a report informing the ALJ that Respondent had refused to complete the settlement documents based on its claim that new information had surfaced that might exonerate Respondent. The status report also requested that the ALJ issue an order adopting the terms of settlement announced at the December 14, 1998, hearing.

By order dated March 22, 1999, the ALJ denied Staff's request for adoption of the settlement. The order also directed the parties to confer and agree to three alternative dates for a reset hearing on the merits and to submit the dates to the ALJ.

On April 7, 1999, Staff filed a Motion for Summary Disposition and Motion to Reset. On April 12, 1999, Respondent submitted to the ALJ the newly discovered information it believed would nullify this proceeding: a February 16, 1999, order by Randy Yarbrough, Assistant Administrator of the Commission, purportedly dismissing the complaint against Respondent. On May 5, 1999, Staff filed a response to the February 16, 1999, order. Staff represented that the order related to a separate allegation and cause number and apparently had been resolved by the Commission without Staff's involvement.

In conjunction with its response to the Commission order Staff reurged its motion for summary disposition based on the settlement agreement made on the record at the December 14, 1998, hearing. By order dated May 27, 1999, the ALJ denied the motion for summary disposition and set the case for hearing on July 15, 1999, at 9:00 a.m. The order also informed the parties of the following:

1. The hearing would be held by telephone unless changed in response to motion by the parties.
2. No later than June 18, 1999, each party was to provide to the other party a list identifying all witnesses it might call to testify at the hearing.
3. No later than June 18, 1999, each party was to provide to the other party copies of all documents or other materials the party planned to offer as exhibits at the hearing.
4. The parties would be contacted at telephone numbers listed in the order, and in the event a party desired to participate from another telephone number, the ALJ was to be provided the new telephone at least 72 hours prior to the hearing.
5. If either party desired to present witnesses from an additional telephone number, the party was to notify the ALJ, in writing, of the request at least 14 days prior to the hearing.

The May 27, 1999, order was received by Staff, which submitted the requested June 18, 1999, filing and appeared at the hearing. Although the order was sent to Respondent via both first class mail and certified mail and the certified mail return receipt reflected that Respondent received the order, Respondent neither submitted the required filings nor was it present to receive the ALJ's telephone calls at approximately 9:05 a.m. and 9:35 a.m. on July 15, 1999.

Respondent's failure to answer the telephone was deemed a failure to appear, and the hearing proceeded on a default basis. Following Staff's presentation of evidence, the hearing and record closed on July 15, 1999.

II. STATEMENT OF THE CASE

There is one allegation in this proceeding. It asserts that on one occasion, Respondent or its agent, servant, or employee paid a beer distributor for beer with a check that was subsequently returned for insufficient funds. It is a violation of TEX. ALCO. BEV. CODE ANN. (the Code) § 61.73(b) for a permittee to give a beer distributor a check, in payment for beer, which is dishonored when presented to the drawee bank for payment. The violation may be punished either by cancellation of the permittee's permit or by suspension of the permit for up to 60 days.

III. EVIDENCE

As described in the Findings of Fact, Respondent violated § 61.73(b) of the Code, as alleged, by writing a check, in payment for beer, that was subsequently returned for insufficient funds. Respondent, its agent, servant, or employee wrote the check. Respondent is responsible for its acts and the acts of its agents.

IV. RECOMMENDATION

Pursuant to § 11.61(b) of the Code, a permit may be suspended for up to 60 days or canceled for violations of the Code or the Commission's rules. Staff recommended a thirty-day suspension of Respondent's two permits. Despite Respondent's failure to appear at the hearing, the ALJ concludes that a lesser penalty more commensurate with the violation is warranted. Section 37.60 of the Commission's rules contains a standard penalty chart to be used by Commission personnel as a guide when making offers of settlement. The recommended penalties are based on the nature of the violation and the number of previous violations committed by the permittee. Although the chart is not clear regarding the manner in which previous violations are considered when determining an appropriate penalty, the recommended penalty for Respondent's violation ranges from a warning to three-day suspension for a first violation to a ten-to-fifteen-day suspension for a third violation.

Based on this range of penalties when considered in light of Respondent's current and previous violations (occurring in April and June of 1998), a 10-day suspension is reasonable. Pursuant to § 37.60(g), neither the hearing officer nor the Commission's administrator is bound by the penalty chart. Nevertheless, it reflects the Commission's views regarding appropriate penalties, and the ALJ deems it a reasonable resource when arriving at a recommendation.

Pursuant to § 11.64 of the Code, a permittee must be offered the opportunity to pay a civil penalty in lieu of suspension. The penalty may not be less than \$150 nor more than \$2,500.00 for each day of the suspension. Based on § 11.64, the ALJ recommends Respondent be given the option of paying a civil penalty in the amount \$1,500, \$150 per day for each day of the suspension.

V. FINDINGS OF FACT

1. Monticello III Group, Inc. dba. Carlsbad Tavern (Respondent), located at 11407 West Avenue, San Antonio, Texas, holds Permit Nos. MB-401140 & LB-401141.
2. On October 29, 1998, Staff mailed to Respondent via certified mail a notice of hearing informing Respondent of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a statement of the matters asserted by Staff. The notice was received by Respondent.
3. By order dated May 27, 1999, the ALJ set the case for hearing by telephone on July 15, 1999, at 9:00 a.m.
4. The May 27, 1999, order was received by Staff, which appeared at the hearing.
5. Although the May 27, 1999, order was sent to Respondent via first class mail and certified mail and the certified mail return receipt reflected that Respondent received the order, Respondent was not present to receive the ALJ's telephone calls at approximately 9:05 a.m. and 9:35 a.m. on July 15, 1999.
6. Respondent's failure to answer the telephone at the time of the hearing was deemed a failure to appear, and the hearing proceeded in Respondent's absence. Following Staff's presentation of evidence, the hearing and record closed on July 15, 1999.
7. On June 23, 1998, Respondent gave a check written on its account in the amount of \$98.35 to San Antonio Coors Distributors, Ltd., a beer distributor, in payment for beer.
8. On June 29, 1998, the check referenced in Finding 8 was returned by the drawee bank, Frost National Bank of San Antonio based on insufficient funds.
9. On June 28, 1998, via agreement reached with Respondent, the Commission ordered that Respondent's permits be suspended for five days, or in lieu of suspension Respondent be allowed to pay an administrative penalty of \$750, for a cash law violation occurring on April 28, 1998.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§ 6.01, 61.71, and 61.73 (Vernon Supp. 1999).

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. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 (Vernon 1999).
4. Respondent, its agent, servant, or employee gave a check in payment for beer, which was dishonored for insufficient funds when presented for payment, in violation of § 61.73(b) of the Code.
5. Based on the foregoing Findings and Conclusions and consistent with § 61.73(b) of the Code, a 10-day suspension of Respondent's permits is warranted.
6. Pursuant to § 11.64 of the Code, Respondent should be allowed to pay a \$1,500 civil penalty in lieu of suspension of its permits.

SIGNED this 4th day of August, 1999.



GARY W. ELKINS
Administrative Law Judge
State Office of Administrative Hearings