

DOCKET NO. 576385

IN RE WISMER DISTRIBUTING CO.	§	BEFORE THE
PERMIT NOS. X-175168, O-175169	§	
LICENSE NOS. BB186367, BI271921	§	
	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0025)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 22nd day of August, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica B. Dorsey. The hearing convened on May 26, 2000. The ALJ closed the record on June 2, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 27, 2000. 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.

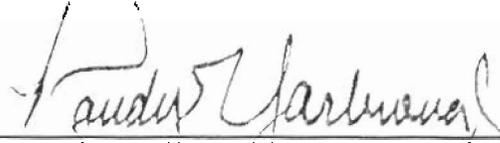
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations regarding Permits Nos. X-175168 and O-175169 and License Nos. BB186367 and BI271921 are hereby **DISMISSED**.

This Order will become final and enforceable on September 8, 2000, unless a Motion for Rehearing is filed **before** that date.

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

WITNESS MY HAND AND SEAL OF OFFICE on this the 22nd day of August, 2000.

On Behalf of the Administrator,

A handwritten signature in cursive script, appearing to read "Randy Yarbrough", written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Veronica B. Dorsey
Administrative Law Judge
State Office of Administrative Hearings
via facsimile (713) 812-1001

R. Michael Moore
ATTORNEY FOR RESPONDENT
Fulbright & Jaworski
1301 McKinney, Ste. 100
Houston, Texas 77010-3095
VIA FACSIMILE (713) 651-5246

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
via facsimile (512) 475-4994

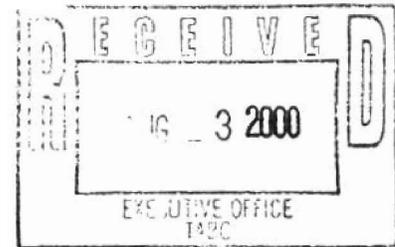
Licensing Division
Houston District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 28, 2000



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

REGULAR MAIL

AUG - 3 2000 ✓

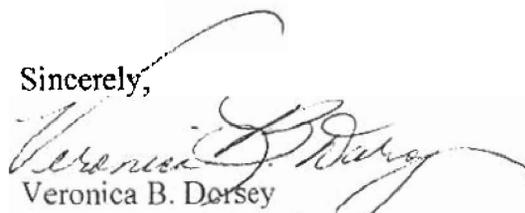
RE: Docket No. 458-00-0025; Texas Alcoholic Beverage Commission vs. Wismer Distributing Company (TABC Case No. 576385)

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 Christopher Burnett, attorney for Texas Alcoholic Beverage Commission and to Mike Moore, attorney for Wismer Distributing Company. For reasons discussed in the proposal, I do not recommend either a suspension, cancellation, or penalty in regards to Respondent's permit or license.

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,


Veronica B. Dorsey
Administrative Law Judge

VBD:et
Enclosure

xc: Holly Wise, Docket Clerk, State Office of Administrative Hearing - **REGULAR MAIL**
Christopher Burnett, Staff Attorney, Texas Alcoholic Beverage Commission, - **REGULAR MAIL**
Mike Moore, Attorney at Law, Fullbright and Jaworski, 1301 McKinney, Houston, Texas 77010-3095 **REGULAR MAIL**

North Loop Office Park
2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001

SOAH DOCKET NO. 458-00-0025

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.S.

WISMER DISTRIBUTING COMPANY,
PERMIT NOS. X-175168, O-175169,
LICENSE NOS. BB-186367, BI-271921
HARRIS COUNTY, TEXAS

§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission, (Petitioner) brought this enforcement action against Wismer Distributing Company, (Respondent) for offenses committed in violation of TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2). TABC alleged that Respondent violated TEX. ALCO. BEV. CODE ANN. §20.01(3) when they failed to sell the malt and vinous liquors, in the original containers in which they are received to retailers and wholesalers authorized to sell them in this state, including holders of local distributor's permits, mixed beverage permits, and daily temporary mixed beverage permits. TABC also alleged that Respondent's actions constitute a violation of a provision of the Texas Alcoholic Beverage Code or The Texas Alcoholic Beverage Commission Rules as outlined under TEX. ALCO. BEV. CODE ANN §11.61(b)(2). Without directly admitting or denying Petitioner's allegations, Respondent argued Petitioner's evidence fails to prove Respondent violated TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2). The Administrative Law Judge (ALJ) agrees with Respondent. This proposal concludes evidence does not prove Respondent committed the violations Petitioner alleged. Therefore, this proposal does not recommend the assessment of a penalty, suspension, or a cancellation against Respondent.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter commenced on May 26, 2000, at the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. Christopher Burnett appeared and represented the Staff of the Commission (Petitioner). Mike Moore appeared and represented Wismer Distributing Company (Respondent). Administrative Law Judge (ALJ), Veronica B. Dorsey presided. Texas Alcoholic Beverage 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 enforcement action and the notice of hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. Discussion

The Respondent possesses a General Class B Wholesaler's Permit (X-175168), a Private Carrier's Permit (O-175169), a General Distributor's License (BB-186367), and an Importers's License (BI-271921); these were issued by Petitioner.

A. Summary of the Parties' Positions

1. Staff

In its Notice of Hearing, Staff alleged the following:

On or about September 24, 1997, Respondent, its agent, servant, or employee, did then and there sell alcoholic beverages to a business not licensed to purchase such beverage, in violation of §§20.01(3) and 11.61(b)(2) of the Code.

On or about December 4, 1997, Respondent, its agent, servant, or employee, did then and there sell alcoholic beverages to a business not licensed to purchase such a beverage, in violation of §§20.01(3) and 11(b)(2) of the Code.

In Petitioner's Notice of Hearing, Petitioner requested the cancellation or suspension of Respondent's permits and licenses.

2. Respondent

Respondent argued that Petitioner failed to meet their burden of proof. Respondent argued Petitioner relied on invoices from Respondent, but the invoices fail to prove Respondent violated TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2). Respondent further argued that if they sold ale to either Karen's Superette or Crosby Exxon, it was an individual sales person's mistake, due to the fact that both facilities have held the appropriate license to sell ale and malt liquor in the past.

B. Evidence and Analysis

1. Factual Background

Undisputed facts in the case are that during 1997, Brian Williams, an enforcement agent with Texas Alcoholic Beverage Commission, conducted inspections of Karen's Superette (Karen's) and Crosby Exxon, and during the context of the inspections, he seized a single Wismer Distributing Company invoice from each establishment. In addition, Agent Williams seized bottles of alcoholic beverages. The parties disputed the contents of the bottles which were seized. They also disputed the probative value of the two invoices that Agent Williams seized.

2. Evidence Considered

The evidence in this case consisted of the testimony of three witnesses together with three exhibits that included a copy of Respondent's wine and beer retailer's permit, two Wismer Distributing Company Invoices, and a seizure slip, numbered 015694.

3. Testimony

a. Petitioner

I. Brian Williams. Agent Williams has been a TABC enforcement agent in Houston, Texas for slightly over three years. He testified that he inspected Karen's around September, 1997. On the day of the inspection, Karen's held an active BF license which meant Karen's was only licensed to sell beer. He testified to observing Bud Ice Ale while inspecting products at Karen's. He also testified to seizing a Wismer Distributing Company

invoice during the inspection because the invoice showed Respondent sold Karen's two six packs of Bud Ice long neck bottles on September 17, 1997.

Agent Williams also testified to conducting a routine inspection of Crosby Exxon during 1997, which included an inspection of their products. On the day of the inspection, Crosby, like Karen's, only held a BF license. During his inspection, he observed Ale and Malt Liquor which he seized, along with a Wismer Distributing Company invoice. He testified to seizing the invoice because the invoice showed Respondent sold a 6 pack or case of Bud Ice bottles to Crosby Exxon.

On cross-examination, Agent Williams testified that neither of the Wismer Distributing Company invoices from Karen's nor Crosby Exxon contain a product which is listed or designated as "Ale." He further testified that he was familiar with the existence of both a Bud Ice Beer and a Bud Ice Ale, and the two products have identical labels with the exception that the Ale bottle denotes, "5.5% alcohol concentration" on its label. When Agent Williams was asked if both Bud Ice Beer and Bud Ice Ale were on the premises the day he conducted the inspection of Karen's, he testified that he did not know if Bud Ice Beer was present, but another beer, Bud Ice Light was present.

Finally, Agent Williams testified that on the day of the inspection, he checked both Karen's current license status and their license history. He recalled Karen's license history showing Karen's license to sell ale and malt liquor expired in 1996.

b. Respondent

I. John O. Washington. Mr. Washington is Respondent's Director of Marketing and Operations. He testified that Respondent's records showed both Karen's and Crosby Exxon possessing license to sell both beer and malt liquor on the days Agent Williams inspected the premises and seized invoices. In addition, Mr. Washington testified that Anheuser Busch produces both Bud Ice Ale and Bud Ice Beer. According to his testimony, Respondent does not have a different or separate product code for Bud Ice Ale and Bud Ice Beer. Therefore, the identity of the product listed as "Bud Ice 6PK LNNR" on the invoice marked as, "TABC EX:3" cannot be determined from the face of the invoice. Finally, he testified Respondent did not have monetary incentive to sell a retail customer Bud Ice Ale versus Bud Ice Beer.

On cross-examination, Mr. Washington explained Respondent's process of producing invoices. According to his testimony, Respondent produced the invoices marked as "TABC EX:2" and "TABC EX:3" at 600 S. Main, Respondent's business headquarters.

While on the premises of Karen's and Crosby Exxon, Respondent's sales person entered the order information into a hand held computer. Thereafter, the order was transmitted to the warehouse where it was turned into an invoice, such as the invoices, marked as "TABC EX: 2" and "TABC EX:3." When Mr. Washington was asked how the license status came to be included in the invoices, he testified that license status information came from Respondent's master customer file database.

Mr. Washington testified that in 1997, Respondent's routine practice was to conduct annual license audits at their customers' premises during which a salesperson would inquire about changes in customer licensing status. In his opinion, an entirely possible scenario was for a Wismer salesperson to be unaware of a change in the license status of either Karen's or Crosby Exxon. He testified that the salesperson may have failed to inquire into any changes in their license status when their visits did not take place during a routine once-a-year license audit.

II. James P. Ferris Mr. Ferris is Respondent's co-owner. He briefly testified to the Respondent's response to receiving an administrative notice and penalty in July of 1997.

4. Analysis, Conclusion, and Recommendation

The testimonial evidence of Enforcement Agent, Brian Williams and John Washington, Respondent's Director of Marketing and Operations witnesses were not entirely opposed on the ultimate issue of whether the evidence before the court shows Respondent committed a violation of TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2). Both Agent Brian Williams and John Washington testified to deficiencies in "TABC Ex:2" and "TABC EX:3" as proof that Respondent sold ale to Karen's and Crosby Exxon on September 17, 1997, and November 12, 1997, respectively.

Agent Williams testified that neither of the invoices that he seized contain a product which is listed or designated as "Ale." Moreover, his testimony was that both Bud Ice Beer and Bud Ice Ale have identical labels with the exception that the ale bottle denotes, "5.5% alcohol concentration." Agent Williams was not asked and did not testify that he observed any of the products listed on the exhibits marked as "TABC Ex:2" and "TABC EX:3," especially the product identified as Bud Ice, as having a designation of "5.5% alcohol concentration" on its label. Even Agent Williams' testimony on direct examination did not provide the ALJ with clear facts as to what he observed. He testified that he seized Respondent's invoice to Karen's because the invoice showed Respondent sold Karen's two six packs of "Bud Ice" long neck bottles on September 17, 1997. Agent Williams did not specifically testify that he seized the invoice because it showed a sale of Bud Ice Ale.

The similarities in the labeling of Bud Ice Ale and Bud Ice Beer combined with the non-specific nature of Agent Williams' testimony are crucial, since the ALJ did not have an independent opportunity to examine the seized items.

John Washington testified that Anheuser Busch produces both Bud Ice Ale and Bud Ice Beer. He also testified that Respondent does not have different product codes for Bud Ice Ale and Bud Ice Beer. John Washington directly challenged the assertion that TABC EX:3 is evidence that the product listed therein as "Bud Ice 6PK LNNR" is an ale versus a beer. On the other hand, Agent Williams did not testify that Respondent had different product codes for Bud Ice Beer and Bud Ice Ale. More important, Agent Williams did not testify that the seized invoices contain a product code or number which, in light of his experience, he knows to be Respondent's designation for Bud Ice Ale. Therefore, Mr. Washington's testimony discredits the exhibits marked as, "TABC EX:2" and "TABC EX:3" as evidence that Respondent sold Karen's and Crosby ale or malt liquor.

Based on the lack of proof as to what products Agent Williams actually seized and what Respondent actually sold to Karen's and Crosby Exxon on September 17, 1997, and November 12, 1997, respectively, the ALJ concludes Petitioner failed to prove Respondent violated TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2). The ALJ does not recommend Respondent's permit should be suspended or canceled as requested in the Notice of Hearing.

III. FINDINGS OF FACT

1. Wismer Distributing Company (Respondent) holds a General Class B Wholesaler's Permit (X-175168), a Private Carrier's Permit (O-175169), a General Distributor's License (BB-186367), and an Importers's License (BI-271921); these were issued by Petitioner.
2. On January 13, 2000, the Texas Alcoholic Beverage Commission (Petitioner) facsimile transferred Respondent a notice of hearing informing Respondent of the nature of the hearing, the legal authority and jurisdiction under which it was to be held, the particular sections and rules involved, and the matters asserted by Petitioner.
3. A hearing in this case was held on May 26, 2000, at the offices of State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. The ALJ closed the record on June 2, 2000. Christopher Burnett represented Petitioner. Mike Moore, Attorney at Law, represented Respondent. Administrative Law Judge (ALJ), Veronica B. Dorsey presided.

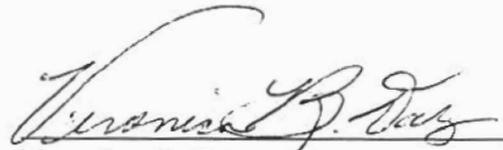
4. On September 17, 1997, Enforcement Agent Brian Williams conducted a routine inspection of Karen's Superette.
5. On November 12, 1997, Enforcement Agent Brian Williams conducted a routine inspection of Crosby Exxon.
6. Both Karen's Superette and Crosby Exxon were licensed to sell only beer on the days Agent Williams conducted inspections of their establishments.
7. During Agent Williams inspections of both Karen's Superette and Crosby Exxon, he seized Wismer Distributing Company invoices. See TABC EX: 2 and TABC Ex:3.
8. Neither of the invoices seized from Karen's Superette nor the invoice seized from Crosby Exxon clearly show Wismer sold Bud Ice Ale or a product with 5.5% alcohol concentration.

IV. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to §106.13 of the Texas Alcoholic Beverage Code (the Code), TEX. ALCO. BEV. CODE ANN. §1.01 et seq. (Vernon Supp. 1998).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1998).
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 1998).
4. Based on Findings 4-8 above, Respondent did not violate TEX. ALCO. BEV. CODE ANN. §§20.01(3) and 11.61(b)(2).

5. Based on the foregoing, Respondent should not be penalized, and their license should not be canceled or suspended.

SIGNED this 27th day of July, 2000.



Veronica B. Dorsey
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS