

DOCKET NO. 578891

IN RE COORS OF AUSTIN, INC.	§	BEFORE THE
D/B/A CAPITOL BEVERAGE CO.	§	
PERMIT NOS. O-114628, X-419467,	§	
LICENSE NOS. BB-195907, BI-195908	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-3348)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of August, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ruth Casarez. The hearing convened on May 17, 2000, and adjourned May 17, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 28, 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.

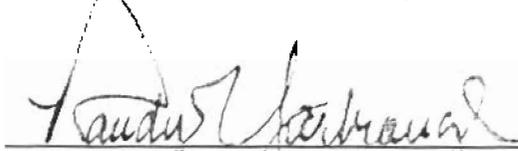
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. O-114628, X-419467 and License Nos. BB195907, BI-195908 are herein **SUSPENDED for a period of five (5) days, beginning at 12:01 A.M. on the 18th day of October, 2000**, unless Respondent pays a civil penalty in the amount of **\$1,000.00** on or before the **11th day of October, 2000**.

This Order will become final and enforceable on August 31, 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 10th day of August, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Ruth Casarez
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

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

Del Booth
Coors of Austin Inc.
d/b/a Capitol Beverage Company
RESPONDENT
P.O. Box 9190
Austin, Texas 78766
CERTIFIED MAIL/RRR NO. Z 473 042 880

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

DOCKET NO. 458-99-3348
(TABC CASE NO. 578891)

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	
	§	
COORS OF AUSTIN, INC.	§	OF
D/B/A CAPITOL BEVERAGE CO.	§	
PERMIT NOS. O-114628 & X-419467	§	
LICENSE NOS. BB-195907 & BI-195908	§	
TRAVIS COUNTY, TEXAS	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Coors of Austin, Inc, d/b/a Capitol Beverage Company (Respondent) alleging three violations of the Texas Alcoholic Beverage Code (the Code). The first violation involved two separate counts that Respondent was party to a prohibited relationship between different levels of industry; the second, that Respondent sold alcoholic beverages to a non-licensed business; and the third, that Respondent employed unlicensed agents to promote brewery products. Staff recommended a civil penalty of \$2,500.00 for the violation involving employing unlicensed agents. Respondent argued that a \$2,500.00 penalty was excessive and urged it be reduced. The Administrative Law Judge (ALJ) recommends Respondent be assessed a civil penalty of \$1,000.00

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

The hearing in this matter convened before Ruth Casarez, ALJ, on May 17, 2000, at the Stephen F. Austin Building, 1700 North Congress, 11th Floor, Suite 1100, Austin, Texas, and concluded the same day. Staff was represented by Assistant Attorney General, Christopher Burnett. Respondent appeared through its employees, Del Booth and Lloyd Butler. Staff and Messrs. Booth and Butler met immediately prior to the hearing and negotiated a number of stipulations. First, Staff dismissed the second allegation as well as one of the two allegations that Respondent had engaged in a prohibited relationship between different levels of industry. As to the latter allegation, Staff recommended Respondent be given a warning. Respondent admitted that violation and also that it had employed unlicensed agents to promote brewery products. There are no contested issues of notice or jurisdiction in this case. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

II. THE ALLEGATION AND APPLICABLE LAW

Staff seeks a civil penalty, because on August 19, 1999, Respondent, its agent, and/or servant employed unlicensed agents to promote brewery products, in violation of Code §§ 73.01 and 73.06. Respondent admitted, at the hearing, that it inadvertently hired two young ladies who were not licensed agents for a promotion on that date. Thus, violation of §73.06 of the Code was established. The only issue to be determined is the penalty that should be assessed. Violation of §73.01 was not established as that section addresses prohibited activity by an unlicensed agent, not by the agent's employer.

Through its rule-making authority, the Commission has developed a "standard penalty chart" that provides guidelines on penalties to be assessed for specific violations of the Code or commission rules. (See 16 TEX. ADMIN. CODE (TAC) § 37.60). However, the chart does not list all of the possible violations of the Code or the rules. 16 TAC §37.60(e) and (g) provide:

(e) [t]he administrator or his designee is authorized to assess penalties for any violation of any of the foregoing statutes or rules for which a penalty is not provided on the chart[.]

...

(g) The standard penalty chart does not bind a hearing examiner, the administrator, or his designee as to penalties for any violation determined to have occurred by the facts presented in an administrative hearing and the record of that proceeding shall be the determining factor as to the sufficiency of the penalty assessed.

In addition, §1.05(a) of the Code provides that "A person who violates a provision of this code for which a specific penalty is not provided is guilty of a misdemeanor and on conviction is punishable by a fine of not less than \$100 nor more than \$1,000 or by confinement in the county jail for not more than one year or by both." The range of fine amounts can be used as guidance in setting the penalty to be assessed in this case, as little evidence was presented to support Staff's recommended penalty of \$2500.00

III. DISCUSSION

As indicated, no evidence was presented to support the proposed penalty. Pursuant to a prehearing negotiation, Respondent admitted that it technically violated the Code by not ensuring two employees had obtained their agents' license prior to their being hired, but it argued the proposed penalty amount was excessive. The ALJ agrees with Respondent. There is no evidence that Respondent routinely disregards this or other sections of the Code or commission rules. In fact, Staff indicated Respondent had not violated §73.06 of the Code before, and stated this case was the first against Respondent in which a penalty was being sought. The violation of Code §73.06 appears to have been an oversight. The instant violation does not relate to any health, safety and welfare, nor to any major regulatory provisions. Therefore, the ALJ recommends that a general penalty of \$500.00 per unlicensed agent hired be imposed

IV. PROPOSED FINDINGS OF FACT

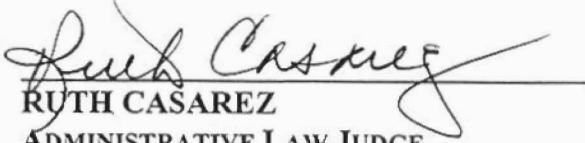
1. Coors of Austin, Inc., d/b/a Capitol Beverage Company (Respondent) holds a General Distributor's License, an Importer's License, a Private Carrier's Permit, and a General Class B Wholesaler's Permit issued by the Texas Alcoholic Beverage Commission (the Commission) for the premises known as Capitol Beverage Company, located at 10300 Metropolitan Drive, Austin, Travis County, Texas.
2. On January 20, 2000, the Commission staff sent an amended notice of hearing to Respondent at its address of record by certified mail, return receipt requested.
3. The hearing on the merits was held on May 17, 2000, at the Stephen F. Austin Building, 1700 North Congress, 11th Floor, Austin, Texas. The Commission was represented by Assistant Attorney General, Christopher Burnett. Respondent appeared through its representatives, Del Booth and Lloyd Butler.
4. Respondent admitted that it violated the provisions of §102.14 of the Code and 16 TAC §45.109 on August 19, 1999.
5. Respondent admitted that it violated §73.06 of the Code by hiring two young ladies who did not have their agents' license to promote the sale of beer on August 19, 1999.
6. Respondent has not previously violated §73.06 of the Code, nor any other Code section or rule that has resulted in a penalty assessment.

V. PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE, (the Code) §§ 6.01, 11.61, 61.71 and 1.01 *et.seq.* (Vernons 1998)
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOVT. CODE ANN., ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOVT CODE ANN. §2001.052.
4. Section 73.01 of the Code sets out activities that are authorized by the holder of an agent's beer license, acting as an employee or representative of a licensed manufacturer or of a licensed distributor.
5. Respondent's acts do not constitute a violation pursuant to §73.01 of the Code.
6. Pursuant to Finding of Fact No. 4, Respondent violated §102.14 of the Code and 16 TAC §45.109.

7. Pursuant to Finding of Fact No. 5, Respondent violated §73.06 of the Code.
8. The Commission's standard penalty chart found at 16 TAC 37.60 does not set out a penalty for violation of §73.06 of the Code.
9. Based on Findings of Fact Nos.4 and Conclusions of Law No. 6, a warning is warranted against Respondent for violation of §102.14 of the Code.
10. Based on Findings of Fact Nos. 5 and 6 and Conclusions of Law No. 7 and 8, a penalty of \$1000.00 is warranted against Respondent for violation of §73.06 of the Code.

SIGNED THIS 28th day of June 2000


RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 2, 2000

Mr. Doyme Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78751

VIA FACSIMILE NO. 206-3498

**RE: Docket No. 458-99-3348 Texas Alcoholic Beverage Commission vs.
Coors of Austin dba Capitol Beverage Co.**

Dear Mr. Bailey:

I have received and reviewed the exceptions to the Proposal for Decision (PFD) that were filed by Staff; no response to the exceptions was filed by Respondent and the time for responding has expired.

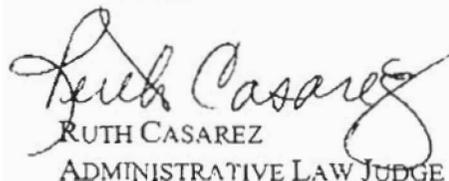
After considering the exceptions, I propose adding two new Conclusions of Law (Nos. 8 and 12) and revising and renumbering Conclusions of Law Nos. 8, 9, and 10, which are in the current PFD. The proposed changes are as follows:

8. Pursuant to §11.64(a) of the Code, the Commission may give a permittee or licensee the opportunity to pay a civil penalty rather than have the permit or license suspended. The amount of civil penalty may not be less than \$150.00 or more than \$25,000.00 for each day the permit or license would have been suspended. The commission is authorized to adopt rules to implement this subsection.
9. [8] The Commission adopted a standard penalty chart, at 16 TAC §37.60, to provide guidance on discipline and penalties that may be imposed for violations of certain Code sections; the chart does not set out a suspension period or penalty for violation of Code §73.06.
10. [9] Based on Finding of Fact No. 4 and Conclusion of Law No. 6, a warning is warranted against Respondent for violation of §102.14 of the Code.

11. [10] Based on Findings of Fact No. 5 and 6 and Conclusions of Law Nos. 7, and 9, Respondent's permits and licenses should be suspended for five days.
12. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent should be permitted to pay a civil penalty of \$1000.00 (\$200.00 per day) in lieu of suspension of the permits and licenses.

For the reasons discussed in the PFD and above, the undersigned amends the proposal as indicated above.

Sincerely,



RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE

RC/dms

xc: Christopher Burnett, Attorney for TABC -FACSIMILE NO. 206-3498
Del Booth, P.O. Box 9190 Austin, Texas 78766-FACSIMILE NO. 837-6953