

DOCKET NO. 584613

IN RE NST, INC.	§	BEFORE THE
D/B/A QUALITY LIQUOR	§	
PERMIT NOS. P-265319, E-265320,	§	
& LP265321	§	TEXAS ALCOHOLIC
LICENSE NO. BF317534	§	
NUECES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0590)	§	BEVERAGE COMMISSION

ORDER,

CAME ON FOR CONSIDERATION this 27th day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl Corbett. The hearing convened on June 8, 2000, and recessed to June 25, 2000, on which date the record closed. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 5, 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.

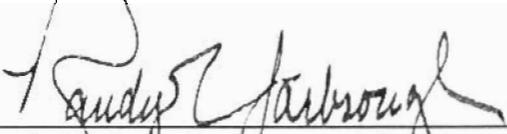
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. P-265319, E-265320, LP265321 and License No. BF317534, are herein **SUSPENDED for a period of fifteen (15) days beginning at 12:01 A.M. on the 31st day of January, 2001**, unless the Respondent pays a civil penalty in the amount of \$2,250.00 on or before the 24th day of January, 2001.

This Order will become final and enforceable on November 17, 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 27th day of October, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl Corbett
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

James Hamilton, President
NST Inc.
d/b/a Quality Liquor
RESPONDENT
P.O. Box 3002
Port Aransas, Texas 78373-3002
CERTIFIED MAIL/RRR NO. Z 473 039 269

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Corpus Christi District Office

State Office of Administrative Hearings

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Shelia Bailey Taylor
Chief Administrative Law Judge

October 5, 2000

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-00-0590; Texas Alcoholic Beverage Commission vs. NST, Inc. d/b/a Quality Liquor, Permit Nos. P-265319, E-265320, LP-265321, PS-265322, License No. BF-317534

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to James Hamilton, President, NST, Inc., d/b/a Quality Liquor (Respondent). For reasons discussed in the Proposal for Decision, the Staff of TABC (the Staff) sought to have the Respondent's license and permits suspended for 15 days or, in lieu thereof, to have the Respondent assessed a penalty of \$150.00 per day for a total penalty of \$2,250.00. This proposal agrees with the recommendation of the Staff.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

for
Erick Corbett

Administrative Law Judge

ECrk
Enclosure

cc: Christopher Burnett, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
James Hamilton, President, NST Inc., d/b/a Quality Liquor, P.O. Box 3002, Port Aransas, Texas 78373-3002 -
VIA REGULAR U.S. MAIL
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**

DOCKET NO. 458-00-0590

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	OF
NST, INC. D/B/A QUALITY LIQUOR	§	
PERMIT NOS. P-265319, E-265320,	§	
LP-265321, PS-265322	§	
LICENSE NO. BF-317534	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the Package Store Permit, Local Cartage Permit, Local Distributor's Permit, Package Store Tasting Permit, and Beer Retailer's Off-Premise License held by NST, Inc. dba Quality Liquor (the Respondent) based on an allegation the Respondent, its agent, servant, or employee, sold alcoholic beverages to a retail dealer for resale. The Staff of TABC (the Staff) sought to have the Respondent's license and permits suspended for 15 days or, in lieu thereof, to have the Respondent assessed a penalty of \$150.00 per day for a total penalty of \$2,250.00. The Respondent contended it had not violated the law or rules of TABC and, if it had, the law and rules were vague. The Respondent further contended TABC had waived the violation, if any, and had dismissed the charges against it. This proposal agrees with the recommendation of the Staff.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

On March 8, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at P. O. Box 3002, Port Aransas, Texas 78373-3002. The Respondent received the notice. The hearing convened on June 8, 2000, before Administrative Law Judge (ALJ) Edel P. Ruiseco at the offices of the State Office of Administrative Hearings (SOAH) at 1225 North Agnes, Suite 102, Corpus Christi, Texas. Staff Attorney Christopher Burnett represented the Staff. The Respondent was represented by its president, James Hamilton. After receipt of the evidence, the hearing was recessed to June 25, 2000, on which date the record closed.

On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the record in the case including the audio tape of the hearing and the admitted exhibits.

II. REASONS FOR DECISION

A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.71(a)(1).

Section 71.05 of the Code provides:

No holder of a retail dealer's off-premise license may borrow or acquire from, exchange with, or loan to any other holder of a retail dealer's off-premise license or holder of a retail dealer's on-premise license any alcoholic beverage for the purpose of resale.

Section 22.01 of the Code provides, in part:

The holder of a package store permit may: . . . (2) sell liquor in unbroken original containers on or from his licensed premises at retail to consumers for off-premises consumption only and not for the purpose of resale. . . .

Section 23.01 of the Code provides, in part:

(a) The holder of a local distributor's permit may: . . . (2) sell and distribute the alcoholic beverages to mixed beverage and private club registration permittees . . .

B. Evidence

Three exhibits were admitted into evidence. Two were offered by TABC and one was offered by the Respondent. TABC's exhibits included: (1) TABC records including copies of the Respondent's license and permits and (2) copies of 14 invoices. The Respondent's exhibit consisted of a single page "Texas Resale Certificate." TABC Agent Karen Smithwick and Susan Lagedrost, president of Bufatso Corporation were called to testify for TABC. The Respondent's effort to call TABC Staff Attorney Gayle Gordon as a witness was denied. The Respondent called no other witness. The undersigned ALJ has taken official notice of the Notice of Hearing issued in this case.

1. TABC's Evidence

TABC's Exhibit No. 1 shows that the Respondent was issued package Store Permit number P-265319, Local Cartage Permit number E-265320, Local Distributor's Permit number LP-265321, and Package Store Tasting Permit number PS-265322 by TABC on May 15, 1996. It also shows the Respondent was issued Beer Retailer's Off-Premise License number BF-317534 by TABC on May 21, 1996. The Respondent's license and permits have been continuously renewed since their

issuance. TABC's Exhibit No. 2 shows that between August 1, 1998, and October 30, 1998, the Respondent sold 30 bottles of wine to Buffatsos Pizza (Buffatsos).

Susan Ann Lagedrost testified that Buffatsos has a beer and wine permit issued by TABC. At the time covered by the allegations in this case, Buffatsos purchased wine from the Respondent for cooking and for resale. The invoices for the wine were made out to Buffatsos. She testified Buffatsos purchased wine from the Respondent because the Respondent's prices were the cheapest they could find.

Ms. Lagedrost testified that once when purchasing wine at the Respondent's establishment, her manager was asked if the wine was being purchased for cooking or resale. He responded the wine was for cooking.

When TABC Agent Smithwick came to Buffatsos she checked the invoices and informed Ms. Lagedrost that the purchases of wine from the Respondent was a violation of the Code. Ms. Lagedrost testified she did not know before that time that the purchases were improper. She testified she did not agree a violation had been committed, but after being cited, agreed to accept the violation, waive a hearing, and paid a fine to TABC.

Ms. Lagedrost agreed that Buffatsos did not pay sales tax on the wines purchased from the Respondent. She identified the invoices contained in TABC's Exhibit No. 2 as invoices she had provided to Agent Smithwick.

TABC Agent Karen Smithwick testified she is a compliance officer for TABC. She went to Buffatsos to perform a food and beverage analysis to be sure Buffatsos qualified for the permit it possessed. She examined invoices to reconstruct the sales. The analysis was based on a three-month sample.

Agent Smithwick noted that Buffatsos purchased its beer from a beer supplier and its wine from the Respondent. She testified Buffatsos has a beer and wine retailer's permit and can sell beer and wine for on-premises or off-premises consumption. According to Agent Smithwick, Buffatsos must purchase its wine from a wholesaler and the wholesaler must deliver the wine. Buffatsos does not possess a cartage permit and hence is not authorized to transport wine to the establishment.

In regard to the Respondent's permits and license, Agent Smithwick testified the package store permit allows the Respondent to sell wine and spirits to consumers; the beer only retailer's license allows the Respondent to sell beer to go; and the local distributor's permit allows the Respondent to make wholesale sales to parties with mixed beverage permits and to those with private club permits. According to Agent Smithwick, the Respondent is prohibited from selling wine to Buffatsos because Buffatsos does not possess the proper license to deal with the Respondent.

Agent Smithwick testified the Respondent is obligated to be sure its sales are proper. According to Agent Smithwick, the Respondent should have asked to see the permit issued to Buffatsos because the Respondent must insure the permit is proper and is current before making the

sale. Agent Smithwick testified the Respondent could not lawfully sell wine to Buffatsos even if it were used for cooking. She was of the opinion the sales to Buffatsos were at wholesale because no sales tax was collected on the sales.

2. Respondent's Evidence

The Respondent's Exhibit No. 1 shows that Buffatsos had authority at the Respondent's establishment to make non-taxable purchases of taxable items for resale.

On cross-examination, Ms. Lagedrost testified Buffatsos had purchased approximately two cases of wine from the Respondent over a two year period. She agreed Buffatsos often purchased ice from the Respondent and she had many invoices with only ice as the item purchased. She identified the Respondent's Exhibit No. 1 as having been signed by an employee of Buffatsos. She agreed that the Respondent did not deliver wines to Buffatsos, neither did Buffatsos have a charge account at, or receive wholesale prices from, the Respondent.

3. Stipulations

The parties stipulated that if Staff Attorney Gayle Gordon were called to testify, she would deny she had dismissed the complaint against the Respondent and that TABC Agent Smithwick had not had contact with Ms. Gordon regarding the case.

III. ANALYSIS AND RECOMMENDATION

A. Analysis

The charge against the Respondent in this case was not clearly pled. TABC alleged:

During the period beginning August 1, 1998 through October 30, 1998, Respondent, its agent, servant or employee, sold alcoholic beverages for the purpose of resale, in violation of Section 71.05 of the Texas Alcoholic Beverage Code.

As stated above, Section 71.05 prohibits a holder of a retail dealer's off-premise license from acquiring from, exchanging with, or loaning to another holder of a retail dealer's off-premise or on-premise license any alcoholic beverage for the purpose of resale. The Respondent, in its dealings with Buffatsos, did not acquire from, exchange with, or loan to Buffatsos any alcoholic beverage for the purpose of resale. The Respondent sold alcoholic beverages to Buffatsos. It was Buffatsos that violated Section 71.05 when it acquired alcoholic beverages from the Respondent for the purpose of resale.

The foregoing notwithstanding, in presenting its case, TABC referred to TEX. ALCO. BEV. CODE ANN. §§22.01 and 23.01. These two sections were not cited in the Notice of Hearing as applicable to this case. At the hearing when the two sections were referenced by TABC, the

Respondent did not object. While the Respondent did not have notice that §§22.01 and 23.01 were applicable, the Respondent failed to point out the lack of notice by timely objecting. In essence, TABC amended its Notice of Hearing with the consent of the Respondent. Consequently, the undersigned ALJ has taken into consideration the provisions of §§22.01 and 23.01.

The Respondent argued that it did not sell wine at wholesale to Buffatsos. That is not the question before this tribunal. The issue is whether the wine sales made by the Respondent to Buffatsos were in violation of the Code. TABC argued the sales, whether wholesale or retail, whether for cooking or not, violated the Code because the Respondent had no authority under the Code to sell wine to Buffatsos.

The Respondent's reason for offering its exhibit is not clear. The Respondent did not testify and his unsworn statements have not been considered as evidence. It seems the exhibit was offered to show Buffatsos bought ice from the Respondent and wanted to buy the ice without paying sales tax. The exhibit does not support the position that only ice was covered by the document. The exhibit, which was signed on October 28, 1997, contains the following statement: "I, the purchaser named above [Buffatsos], claim the right to make a non-taxable purchase **for resale** of the taxable items described below or on the attached order or invoice form." (Emphasis added.) No order or invoice is attached and no items are described on the form. The sales of wine to Buffatsos, which are the subject of this hearing, were made subsequent to the execution of the exhibit and no sales taxes were collected on the wine sales. Consequently, it appears, from the Respondent's exhibit, that the Respondent was on notice that the wine was purchased for resale.

The Respondent holds a package store permit. Section 22.01 of the Code prohibits a package store permit holder from selling alcoholic beverages for the purpose of resale. The Respondent also holds a local distributor's permit. Section 23.01 of the Code allows the holder of a local distributor's permit to sell alcoholic beverages to holders of mixed beverage and private club registration permits, not to holders of a retail dealer's on-premise or off-premise license. The Respondent holds a local cartage permit and a package store tasting permit, neither of which allows sales of wines. The Respondent holds a beer retailer's off-premise license which does not authorize the sales of wines.

The Respondent's arguments that the law is not clear and that TABC has internal disagreements as to whether he violated the law may be true, but are not relevant. The Respondent's argument that it is a common practice to sell wines to restaurants for cooking may also be true, but does not make it any less a violation of the Code in this instance. There is no evidence that TABC fails to enforce the Code when violations are noted.

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Code or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.71(a)(1). **The preponderance of the evidence indicates the Respondent violated Sections 22.01 and 23.01 of the Code.**

The Staff recommended the Respondent be assessed a fifteen day suspension of its license and permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

B. Recommendation

The undersigned ALJ agrees with the Staff and recommends the Respondent be assessed a fifteen day suspension of its license and permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

IV. PROPOSED FINDINGS OF FACT

1. NST, Inc. d/b/a Quality Liquor (the Respondent) holds a Package Store Permit, Local Cartage Permit, Local Distributor's Permit, Package Store Tasting Permit, and a Beer Retailer's Off-Premise License issued by the Texas Alcoholic Beverage Commission (TABC).
2. Between August 1, 1998, and October 30, 1998, the Respondent sold 30 bottles of wine to Buffatsos Pizza (Buffatsos).
3. The wine identified in Finding of Fact No. 2 was used for cooking and for resale to customers at Buffatsos.
4. Buffatsos holds a beer and wine retailers permit issued by TABC.
5. The Respondent had notice, by way of a Texas Resale Certificate, that items purchased from the Respondent by Buffatsos were for the purpose of resale.
6. On March 8, 2000, notice of the hearing to consider sanctions against the Respondent was sent by certified mail, return receipt requested, to the Respondent at P. O. Box 3002, Port Aransas, Texas.
7. The Respondent or its agent received the notice of hearing.
8. The hearing to consider the allegations convened on June 8, 2000, before Administrative Law Judge Edel P. Ruiseco with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1225 North Agnes, Corpus Christi, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by its president, James Hamilton.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01, 11.61, and 61.71.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Findings of Fact Nos. 2-5, the Respondent sold wine to a holder of a beer and wine retailer's permit for the purpose of resale in violation of TEX. ALCO BEV. CODE ANN. §§22.01 and 23.01.
5. Based on the foregoing findings of fact and conclusions of law, TABC is warranted in suspending the Respondent's license and permits for a period of fifteen days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$2,250.00. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.71(a)(1).

SIGNED this 5th day of October, 2000.


for EARL A. CORBITT
Administrative Law Judge
State Office of Administrative Hearings