

DOCKET NO. 584784

IN RE EPHEN STEPHENS, INC.	§	BEFORE THE
D/B/A ANDERSON MILL TAVERN	§	
PERMIT NOS. MB239399, LB239400,	§	
& PE239401	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0197)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 17th day of October 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened and adjourned on July 13, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 18, 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. 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.

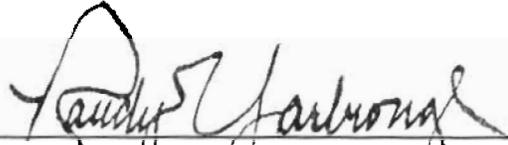
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB239399, LB239400, and PE239401 are herein **SUSPENDED for a period of fourteen (14) days, beginning at 12:01 A.M. on the 17th day of January, 2001**, unless the Respondent pays a civil penalty in the amount of **\$2,800.00** on or before the **10th day of January, 2001**.

This Order will become final and enforceable on November 7, 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 17th day of October, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable John H. Beeler
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

Michael T. Parr
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CERTIFIED MAIL/RRR NO. Z 473 042 999

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

September 18, 2000

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

HAND DELIVERY

**RE: Docket No. 458-00-0197; Ephen Stevens, Inc., D/B/A Anderson Mill Tavern;
Permit Nos. MB-239399, LB-239400 & PE-239401 TRAVIS COUNTY, TEXAS
(TABC CASE No. 584784)**

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 Michael Parr attorney for Respondent. For reasons discussed in the Proposal for Decision, this proposal recommends that the permits be suspended for 14 days and that the licensee be allowed to pay \$200.00 per day in lieu of suspension

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,



John H. Beeler
Administrative Law Judge

JB\rk
Enclosure

xc: Christopher Burnett, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Michael Parr, P.O. Box 161314, Austin, Texas 78716-1314 - **VIA REGULAR U.S. MAIL**
Rommel Corro, Docket Clerk, State Office of Administrative Hearings - **VIA HAND DELIVERY**

DOCKET NO. 458-00-0197

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
PETITIONER	§	
V.	§	
	§	
EPHEN STEVENS, INC., D/B/A	§	OF
ANDERSON MILL TAVERN	§	
PERMIT NOS. MB-239399, LB-239400	§	
& PE-239401 TRAVIS COUNTY, TEXAS,	§	
(TABC CASE NO. 584784)	§	
RESPONDENT	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against a licensee of the Commission alleging the following: (1) an agent or employee of licensee sold, served, or delivered alcoholic beverages to two intoxicated persons, (2) an agent or employee of licensee was intoxicated on the licensed premises, and (3) an employee, agent, or servant of licensee possessed distilled spirits without a serially numbered identification stamp. The Staff recommended that the subject permits be suspended for a total of 40 days for and the licensee be allowed to pay \$6000.00 in lieu of suspension for violations of the Texas Alcoholic Beverage Code (the Code). The licensee appeared at the hearing and was represented by counsel. This Proposal For Decision recommends that the permits be suspended for 14 days and that the licensee be allowed to pay \$200.00 per day in lieu of suspension.

I. Procedural History

On January 27, 2000, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Ephen Stevens, d/b/a Anderson Mill Tavern (Respondent) that the Staff would seek disciplinary action against Respondent's permits because: (1) an agent or employee of licensee sold, served, or delivered alcoholic beverages to two intoxicated persons, (2) an agent or employee of licensee was intoxicated on the licensed premises, and (3) an employee, agent, or servant of licensee possessed distilled spirits without a serially numbered identification stamp. The Staff asserted that such acts constitute grounds for suspension or cancellation of the Respondent's permits.

The hearing commenced on July 13, 2000, in the offices of the State Office of Administrative Hearings, Austin, Travis County, Texas. After the taking of evidence, the hearing was concluded, but the record was left open until July 20, 2000, for the filing of post hearing briefs. Staff was represented by staff attorney Christopher Burnett. Respondent was represented by attorney Michael Parr.

II. Jurisdiction and Notice

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

III. Evidence

A. Testimony of TABC witnesses.

1. Melissa Hightower.

Melissa Hightower testified that on May 8, 1999, she was employed as an investigator by the Commission. On that date she was on the premises of Anderson Mill Tavern in an undercover capacity, accompanied by TABC agent Russell Moore. While on the premises she observed a woman, later identified as Elaine Herzer, to be stumbling around the bar and to have slurred speech and bloodshot eyes. Hightower followed Herzer into the women's restroom and observed her attempt to urinate in the sink. Hightower left the restroom prior to Herzer and then observed Herzer exit and, while doing so, fall into walls.

Hightower and Moore continued to watch Herzer and observed order and receive an alcoholic beverage from the bartender, Thomas Zurovec. While ordering the drink, she appeared to be intoxicated, and had trouble communicating her order to the bartender.

2. Randall Brown.

Randall Brown testified that on May 8, 1999, he was employed by the Commission. On that day that he participated in a sting operation concerning Anderson Mill Tavern as a uniformed officer. He, along with several other uniformed officers, went to the licensed premises when called to the scene by agent Moore. Based on information provided by agent Moore, Brown made contact with two patrons of the bar and took them outside to perform field sobriety tests. The two patrons, Elaine Herzer and Colin Bates, were described by Moore as being intoxicated and to have been served drinks while appearing intoxicated.

Herzer was very unsteady and she described her condition as "fucked up" and "drunk." Brown observed Herzer to have slurred speech and bloodshot eyes, and arrested her for public intoxication. After arresting Herzer, Brown spoke to Bates who stated that he got drunk at home and

then came to then to the bar in a taxi. He had several drinks at the bar. When asked to perform sobriety tests, Bates stated that it would be useless to do the tests because he was intoxicated. Brown observed Bates to be very intoxicated. It is Brown's opinion that it would have been obvious, to anyone who observed Herzer and Bates, that they were clearly intoxicated.

3. Roger Harris.

Roger Harris testified that, on May 8, 1999, he was employed as a deputy by the Williamson County Sheriff's Department and was part of a sting operation at the licensed premises. Prior to that date he had arrested many individuals who had consumed alcohol at the bar. During the sting operation he performed the Horizontal Gaze Nystagmus sobriety test on Elaine Collins, an employee of Anderson Mill. Collins failed the test and was arrested for public intoxication.

4. Michael Hunter

Michael Hunter testified that, on May 8, 1999, he was employed as an agent by the Commission and was a uniformed participant in the sting operation on the licensed premises. His responsibility was to inspect the bar for violations of the Code. He inspected hundreds of bottles of distilled spirits and found two bottles, behind the bar where Thomas Zurovec was working as a bartender, that did not have the required tax stamps. Hunter often conducts this type of inspection and sometimes instructs the licensee to destroy the bottles with stamps and issues an administrative warning instead of issuing a citation. Because he was part of a sting operation, in this case he issued citations.

B. Testimony of Respondent's witnesses.

1. Danny Stevens

Danny Stevens testified that is the president and owner of Ephen Stevens, Inc., but was not present at Anderson Mill Tavern during the sting operation. Typically, there are about 300 bottles of distilled spirits at the bar. One of the bottles without a tax stamp had been purchased about one year prior to the sting operation and it is possible that the tax stamp had fallen off. Further, sometimes bottles purchased from a distributor will, because of a mistake, not have a stamp. Stevens never purchases untaxed liquor and has never been cited for doing so.

2. Elaine Collins

Elaine Collins testified that, on May, 1999, she was employed by Ephen Stevens and was on duty as a bartender at Anderson Mill Tavern. An officer flashed a pen in front of her face, which was the only sobriety test she was given. She was not intoxicated and had not been drinking that evening. She was not convicted of public intoxication.

3. Thomas Zurovec

Thomas Zurovec testified that, on May, 1999, he was employed by Ephen Stevens and was on duty as a bartender at Anderson Mill Tavern. Officers tested him for intoxication that night and found him not to be intoxicated. He served two of drinks at the same time to Elaine Herzer but did not notice her to be intoxicated.

IV. Statutory Criteria

1) TEX. ALCO. BEV. CODE ANN §§ 11.61

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

- (1) the permittee has been finally convicted of a violation of this code;
- (2) the permittee violated a provision of this code or a rule of the commission;
- (13) the permittee was intoxicated on the licensed premises;
- (14) the permittee sold or delivered an alcoholic beverage to an intoxicated person;

2) TEX. ALCO. BEV. CODE ANN §§ 28.15

(a) A mixed beverage permittee may not possess or permit a person to possess on the premises distilled spirits in any container that does not bear a serially numbered identification stamp issued by the commission or other identification approved by the commission.

(b) A holder of a local distributor's permit may not knowingly sell, ship, or deliver distilled spirits in any container that does not bear a serially numbered identification stamp issued by the commission or other identification approved by the commission.

(c) Identification stamps may be issued only to a holder of a local distributor's permit who shall affix the stamps as prescribed by the commission or administrator.

V. Discussion

- 1) Serving to an intoxicated person, Elaine Herzer. ✓

The preponderance of the evidence suggests that Herzer was clearly intoxicated, a fact that Respondent does not dispute. Although Thomas Zurovec testified that he did not notice signs of intoxication, the evidence from the TABC agents is convincing. It is highly improbable that anyone

in contact with Zurovec would fail to notice her condition. TABC requested a total of 40 days suspension for all of the violations alleged. Because there is no information to the contrary, the ALJ assumes that TABC is seeking 10 days for each violation. The Standard Penalty Chart found at 16 TEX. ADMIN. CODE §37.60 provides for a first violation of serving to an intoxicated person to result in a 7 day suspension. Although the ALJ is not bound by the chart, considering the facts of this case, including the fact that the licensee was not present when the violation occurred, a 7 day suspension seems reasonable. Further, respondent should be allowed to pay \$200.00 per dy in lieu of suspension.

2) Serving to an intoxicated person, Colin Bates.

Although it is obvious from the evidence that Colin Bates was highly intoxicated, there was no evidence presented that anyone in the bar sold, served, or delivered alcohol to him. It is just as likely, considering the evidence presented, that Mr. Bates was drinking other peoples drinks or having someone else order his drinks, as it is that he was ordering the himself. Considering the evidence presented, no violation is found.

3) Agent, servant, or employee intoxicated on the licensed premises. ✓

The preponderance of credible evidence demonstrates that Elaine Collins, a bartender on duty at the club, was clearly intoxicated. If Ms. Collins testimony is to be believed, the TABC agents and Williamson County Officers arrested and took to jail a person that had had nothing at all to drink. The idea of an officer bringing a completely sober person into a jail facility for booking for public intoxication is simply not believable. If Ms. Collins' testimony had been that she had consumed some alcohol, but was not intoxicated, her version of the facts might have been more reasonable.

The Standard Penalty Chart provides for a seven day suspension for a first violation of an employee, agent, or servant being intoxicated on the licensed premises. For the same reasons discussed under the first violation above, a seven day suspension or \$200.00 per day civil penalty is appropriate.

4) Possession of distilled spirits without tax stamps

The evidence is undisputed that two bottles of liquor were in the bar without tax stamps. The Standard Penalty Chart provides a range from a warning to a 10 day suspension for a first violation. Considering that only two out of approximately 300 bottles inspected were found to be missing the required stamps, a warning is appropriate.

PROPOSED FINDINGS OF FACT

1. Ephen Stevens Inc., d/b/a Anderson Mill Tavern (Respondent) is the holder of Permit Nos. MB- 239399, LB-239400, and PE-239401.
2. The Texas Alcoholic Beverage Commission sent a notice of hearing to Respondent dated January 27, 2000.

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 July 13, 2000, at the offices of the State Office of Administrative Hearings in Austin, Travis County, Texas. Respondent appeared and was represented by council. Attorney Dewey Brackin, represented Staff. The record was left open until July, 21 2000, to allow the parties to file briefs.
5. On May 8, 1999, Thomas Zurovec, an employee of Respondent, was working as a bartender on the licensed premises and served an alcoholic beverage to an intoxicated person, Elaine Herzer.
6. On May 8, 1999, Elaine Collins, an employee of Respondent, was working as a bartender on the licensed premises and was intoxicated.
7. On May 8, 1999, there were two bottles of distilled spirits were behind the bar where Thomas Zurovec was working as a bartender on the licensed premises without serially numbered identification stamps.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § §106.13 and 11.61(b)(2) (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction in 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. § 2001.
3. Service of proper and timely notice of the hearing was provided to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. § 2001 and 1 TEX. ADMIN. CODE § 155.
4. Based upon Findings of Fact No. 5, Respondent's employee, served an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN § 11.61 (b) (14).
5. Based upon Finding of Fact Nos. 6 Respondent's employee was intoxicated on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN § 61.71 (b) (13).
6. Based upon Findings of Fact No. 7, there were bottles of distilled spirits on the licensed premises in violation of TEX. ALCO. BEV. CODE ANN § 11.61 (b) (2).

7. Pursuant to 16 TEX. ADMIN. CODE § 37.60(Standard Penalty Chart), Respondent's permit and license should be suspended for 14 days, and Respondent should be allowed to pay a civil penalty in the amount of \$200.00 per day in lieu of suspension.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Permits should be suspended for a period of 14 days and Respondent should be allowed to pay a civil penalty in the amount of \$200.00 per day in lieu of suspension.

Signed this 18 day of September, 2000.



JOHN H. BEELER
Administrative Law Judge
State Office of Administrative Hearings

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge
September 15, 2000



TO: Christopher Burnett
Assistant Attorney General
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

On this date the following item(s) were delivered to you regarding; Docket No. 458-00-0197; Ephes Stevens, Inc., D/B/A Anderson Mill Tavern; Permit Nos. MB-239399, LB-239400 & PE-239401 TRAVIS COUNTY, TEXAS (TABC CASE No. 584784) BG-426169

1. A copy of Proposal for Decision

Your signature below acknowledges receipt of the above-referenced item(s) from the State Office of Administrative Hearings.

Signature of Receiving Party

9-18-00

Date

JB\rk