

**DOCKET NO. 587185**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
TOMATOES BAR & GRILL, INC.	§	
D/B/A TOMATOES BAR & GRILL	§	
PERMIT NO. BG-426169	§	
HIDALGO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0288)	§	ADMINISTRATIVE HEARINGS

**O R D E R**

**CAME ON FOR CONSIDERATION** this 16th day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl Corbitt. The hearing convened on March 6, 2000, and adjourned April 20, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 12, 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 No. BG-426169 is herein **SUSPENDED for a period of five (5) days, beginning the 20th day of December, 2000, unless a civil penalty in the amount of \$750.00 is paid on or before the 13th day of December, 2000.**

**This Order will become final and enforceable on November 6, 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 16th day of October, 2000.

On Behalf of the Administrator,



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Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Earl A. Corbitt  
State Office of Administrative Hearings  
**VIA FACSIMILE (512) 475-4994**

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

Thomas Moncivais, President  
Tomatoes Bar & Grill, Inc.  
**RESPONDENT**  
1019 Hwy 83 West  
Alamo, Texas 78516-2530  
**CERTIFIED MAIL NO. Z 473 042 593**

Gayle Gordon  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission

McAllen District Office  
Licensing Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 587185

REGISTER NUMBER:

NAME: Tomatoes Bar & Grill, Inc.

TRADENAME: Tomatoes Bar & Grill

ADDRESS: 105 S. Alamo Road, Alamo, Hidalgo County, Texas

DATE DUE: December 13, 2000

PERMITS OR LICENSES: BG-426169

AMOUNT OF PENALTY: \$750.00

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 13TH DAY OF DECEMBER, 2000, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below.  
**MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

**WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.**

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip Code

\_\_\_\_\_  
Area Code/Telephone No.

# State Office of Administrative Hearings

Shelia Bailey Taylor  
Chief Administrative Law Judge

SEP 12  
587185

September 12, 2000

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

**HAND DELIVERY**

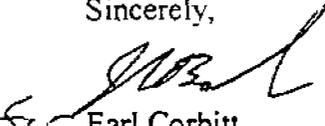
**RE: Docket No. 458-00-0288; *TABC vs. Tomatoes Bar & Grill, Inc. d/b/a Tomatoes Bar & Grill BG-426169***

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 Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Thomas Moncivais, President, Tomatoes Bar & Grill, Inc., d/b/a Tomatoes Bar & Grill (Respondent). For reasons discussed in the Proposal for Decision, the Staff of TABC (the Staff) sought to have the Respondent's permit suspended for five days or, in lieu thereof, to have the Respondent assessed a penalty of \$750.00. 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,



Earl Corbitt  
Administrative Law Judge

EC/rk  
Enclosure

cc: **Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY**  
**Thomas Moncivais, President, Tomatoes Bar & Grill, Inc., 1019 Hwy. 83 West, Alamo, Texas 78516-2530 -VIA REGULAR U.S. MAIL**  
**Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY**

DOCKET NO. 458-00-0288

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

TOMATOES BAR & GRILL, INC.  
D/B/A TOMATOES BAR & GRILL  
BG-426169

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the wine and beer retailer's permit held by Tomatoes Bar & Grill, Inc. d/b/a Tomatoes Bar & Grill (the Respondent) based on four allegations that the Respondent paid for beer, or the containers or original packages in which it is contained or packaged, by issuing checks which were dishonored when presented because of insufficient funds. The Staff of TABC (the Staff) sought to have the Respondent's permit suspended for five days or, in lieu thereof, to have the Respondent assessed a penalty of \$750.00. The Respondent asserted the office of the Texas Comptroller of Public Accounts had frozen his bank accounts causing the checks to be insufficient. This proposal agrees with the recommendation of the Staff.

**I. PROCEDURAL HISTORY, NOTICE & JURISDICTION**

On February 2, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at 105 South Alamo Road, Alamo, Texas 78516-2201. The Respondent received the notice. The hearing convened on March 6, 2000, before Administrative Law Judge (ALJ) Edel P. Ruiseco at the offices of the State Office of Administrative hearings (SOAH) at 1508 Dove Avenue, McAllen, Texas. Staff Attorney Gayle Gordon represented the Staff. The Respondent was represented by its president, Tomas Moncivais. The Respondent was not ready to proceed and the hearing was recessed. On April 3, 2000, the hearing on the merits reconvened. The Staff was represented by Staff Attorney Christopher Burnett. Tomas Moncivais represented the Respondent. After receipt of the Staff's evidence, the record was left open because the Respondent had failed to provide copies of its proposed exhibits to TABC prior to the hearing in violation of Prehearing Order No. 2 issued by ALJ Ruiseco on February 14, 2000. The Respondent was directed to provide copies of the documents to the Court and to TABC within five days. The hearing was ordered closed on April 20, 2000. On May 3, 2000, a post-hearing telephone conference was conducted at which Staff Attorney Gayle Gordon represented TABC. The Respondent was unavailable for the telephone conference. As of May 3, 2000, ALJ Ruiseco had not received the documents required from the Respondent. ALJ Ruiseco left the record open until July 1, 2000, to allow the parties to file additional evidence. The record closed on July 1, 2000, without the filing of the additional evidence.

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) and 61.71(a)(1).

Section 61.73(b) of the Code provides:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee gave a check, as maker or endorser, or a draft, as drawer or endorser, as full or partial payment for beer or the containers or packages in which it is contained or packaged, which is dishonored when presented for payment.

### B. Evidence

Two exhibits were admitted into evidence. They included: (1) the notice of hearing together with four affidavits and (2) TABC records including a copy of the Respondent's permit. Only Tomas Moncivais testified.

#### 1. TABC's Exhibits

By affidavit dated July 26, 1999, Robert Casso, General Manager of L&F Distributors, LTD, of McAllen, Texas, stated that on July 15, 1999, the Respondent had issued a check in the amount of \$391.55 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and that the check was dishonored by the Texas Country Bank for insufficient funds.

By affidavit dated November 9, 1999, Robert Casso, General Manager of L&F Distributors, LTD, of McAllen, Texas, stated that on October 27, 1999, the Respondent had issued a check in the amount of \$917.25 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and that the check was dishonored by the Texas Country Bank for insufficient funds.

By affidavit dated November 19, 1999, Robert Casso, General Manager of L&F Distributors, LTD, of McAllen, Texas, stated that on November 4, 1999, the Respondent had issued a check in

the amount of \$476.70 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and that the check was dishonored by the Texas Country Bank for insufficient funds.

By affidavit dated November 5, 1999, Rosie Morales, Supervisor of Valley Beverage of McAllen, Inc., McAllen, Texas, stated that on October 28, 1999, the Respondent had issued a check in the amount of \$218.20 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and that the check was dishonored by the Texas Country Bank for insufficient funds.

## **2. Testimony of Tomas Moncivais**

Mr. Moncivais testified the office of the Texas Comptroller of Public Accounts placed a freeze on his checking account causing the four checks described in TABC exhibits to be returned for insufficient funds. He testified he had money in the account to cover the checks and that he had no control over the Comptroller's actions.

### **III. ANALYSIS AND RECOMMENDATION**

#### **A. Analysis**

The governing statute, TEX. ALCO. BEV. CODE ANN. §61.73(b) states it is a violation of the Code when the Respondent's check is dishonored if that check is issued to purchase beer or the containers and original packages in which the beer is contained. The Respondent was offered multiple opportunities to present documentary evidence of some error that caused its checks to be dishonored by the bank. There is no such evidence in the record presented to the undersigned ALJ. It is the evidence in the record upon which this proposal for decision must be based.

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) and 61.71(a)(1). The preponderance of the evidence indicates that on four occasions the Respondent violated Section 61.73 of the Code.

The Staff recommended the Respondent be assessed a five day suspension or, in lieu of the suspension, a forfeiture of \$750.00.

#### **B. Recommendation**

The undersigned ALJ agrees with the Staff and recommends the Respondent be assessed a five day suspension or, in lieu of the suspension, a forfeiture of \$750.00.

#### IV. PROPOSED FINDINGS OF FACT

1. Tomatoes Bar & Grill, Inc. d/b/a Tomatoes Bar & Grill (the Respondent) holds a Wine and Beer Retailer's Permit issued by the Texas Alcoholic Beverage Commission (TABC).
2. On July 15, 1999, the Respondent issued a check to L&F Distributors, LTD, McAllen, Texas, in the amount of \$391.55 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent. The check was dishonored by the Texas Country Bank for insufficient funds.
3. On October 27, 1999, the Respondent issued a check to L&F Distributors, LTD, McAllen, Texas, in the amount of \$917.25 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent. The check was dishonored by the Texas Country Bank for insufficient funds.
4. On November 4, 1999, the Respondent issued a check to L&F Distributors, LTD, McAllen, Texas, in the amount of \$476.70 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent. The check was dishonored by the Texas Country Bank for insufficient funds.
5. On October 28, 1999, the Respondent issued a check to Valley Beverage of McAllen, Inc., McAllen, Texas, in the amount of \$218.20 as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and that the check was dishonored by the Texas Country Bank for insufficient funds.
6. On February 2, 2000, notice of the hearing to consider sanctions against the Respondent was sent by certified mail, return receipt requested, to the Respondent at its address of record, 105 South Alamo Road, Alamo, Texas 78516-2201.
7. The Respondent or its agent received the notice of hearing.
8. The hearing to consider the allegations convened on March 6, 2000, and reconvened on April 3, 2000, before Administrative Law Judge Edel P. Ruiseco with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1508 Dove Avenue, McAllen, Texas. Staff Attorney Gayle Gordon represented the TABC on March 6, 2000, and Staff Attorney Christopher Burnett represented TABC on April 3, 2000. The Respondent was represented by its president, Tomas Moncivais.

## PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§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 issued checks on four occasions as payment for beer and the containers and original packages in which the beer was contained when delivered to the Respondent and the four checks were dishonored by the Texas Country Bank for insufficient funds in violation of TEX. ALCO BEV. CODE ANN. 61.73(b).
5. Based on the foregoing findings of fact and conclusions of law, TABC is warranted in suspending the Respondent's permit for a period of five days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$750.00. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 61.71(a)(1).

SIGNED this 12<sup>th</sup> day of September, 2000.

  
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Earl A. CORBITT  
Administrative Law Judge  
State Office of Administrative Hearings