

DOCKET NO. 588724

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
LANDMARK INDUSTRIES LTD.	§	
D/B/A TIMEWISE FOOD STORES #1301	§	
PERMIT NO. BQ239637	§	
HARRIS COUNTY, TEXAS	§	
(SOAH Docket No. 458-00-2027)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of October, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge . The hearing convened on January 25, 2001, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on . 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.

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.

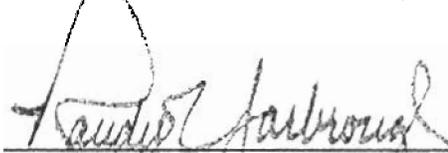
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on November 14, 2001, 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 24th day of October, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Rex A. Shaver
Administrative Law Judge
State Office of Administrative Hearings,
VIA FACSIMILE: (713) 812-1001

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

Bob Duff
REPRESENTATIVE OF RESPONDENT
4811 Bellfort
Houston, Texas 77033
REGULAR MAIL

Dewey A. Brackin
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Houston District Office

SOAH DOCKET NO. 458-00-2027

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
vs.	§	OF
	§	
LANDMARK INDUSTRIES LTD.	§	
D/B/A TIMEWISE FOOD STORES #1301	§	
PERMIT NO. BQ-239637	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 588724)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against Landmark Industries Ltd. d/b/a Timewise Food Stores #1301 (Respondent) a permittee of the Commission, alleging that the permittee consumed or permitted the consumption of an alcoholic beverage on the premises of a package store in violation of TEX. ALCO. BEV. CODE §§ 11.61 (b) (2) and 22.11. The staff recommended that the Respondent's permit be suspended for six days or in lieu thereof, be given the opportunity to pay a civil penalty of \$150.00 per day for a total penalty of \$900.00 rather than have its permit or license suspended. The ALJ concludes there is insufficient evidence that the permittee violated TEX. ALCO. BEV. CODE § 22.11, and recommends that no action be taken against the Respondent's permit.

I. Procedural History

By Notice of Hearing dated August 6, 2000, and by Amended Notice of Hearing dated September 12, 2000, the Staff of the Texas Alcoholic Beverage Commission (the Staff), notified Landmark Industries Ltd. d/b/a Timewise Food Stores #1301 (Respondent) that the staff would seek disciplinary action against the Respondent's permit because the Respondent consumed or permitted the consumption of an alcoholic beverage on the premises of a package store in violation of TEX. ALCO. BEV. CODE (the Code) § 22.11. The Staff asserted that such act constituted grounds for suspension or cancellation of the permits or licenses held by Respondent.

On January 25, 2001, the hearing commenced, pursuant to the Amended Notice of Hearing, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. The Staff was represented by Christopher Burnett, of the TABC Legal Section. The Respondent was represented by Bob Duff, its authorized representative.

II. Jurisdiction and Notice

The Commission has jurisdiction over this matter pursuant to §§ 6.01 and 11.61 the Code. 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. Chapter 2003.

The Respondent is the holder of a Wine and Beer Retailer's Off Premise Permit and held that permit on the date of the alleged violation. On September 12, 2000, the Amended Notice of Hearing in this matter was mailed to the Respondent at 4811 Bellfort, Houston, Texas by Certified Mail Return Receipt Requested. Respondent received the notice pursuant to TEX. GOV'T CODE ANN. Chapter 2001.

III. REASONS FOR DECISION

A. Legal Standard

Commission may suspend or cancel a permit if a permittee is found to have violated a provision of the Code or a rule adopted by the Commission.. TEX. ALCO. BEV.CODE ANN. §§ 6.01(b), 11.61(b)(2)..

Section 22.11 of the Code provides:

Except as authorized under Section 52.01, no person may sell, barter, exchange, deliver, or give away any drink or drinks of alcoholic beverages from a container that has been opened or broken on the premises of a package store.

B. Evidence

One exhibit was offered by the Staff and was admitted into evidence without objection. The Staff's exhibit consisted of records including copies of the respondent's permit and violation history. The Respondent offered one exhibit, a blueprint of the premises and parking area, which was admitted into evidence without objection. Commission Agent Eric Z. Doman was called to testify for the Staff. Lisa Johnson and Mohammed Saidykhan, employees of Respondent on the night of the alleged violation, were called to testify for the Respondent. The undersigned ALJ took official notice of the Notice of Hearing and Amended Notice of Hearing issued in this case.

1. Staff's Evidence

TABC's Exhibit No.1 shows that the Respondent was issued Wine and Beer Retailer's Permit, BQ-239637 on December 13, 1988. The Respondent's permit has been continuously renewed since that date. The premises covered by the permit is known as Timewise Food Stores #1301, 4811 Bellfort, Houston, Harris County, Texas.

Commission Agent Eric Z. Doman testified that on March 16, 2000, he and his partner were on routine patrol in the area of the licensed premises. Between 9:30 and 10:00 p.m. he saw a group of three persons gathered in front of Respondent's licensed premises and drinking some beverage. When making this initial observation he was seated in an automobile 60 yards from the group. While still in the automobile he and his partner approached the group. He testified he then observed one individual drink from a can of beer. He saw another individual in possession of an open can of beer but did not see that person consume any beer. Agent Doman testified that the group was standing two feet from the front door into the premises. His partner, Agent Chadwick, issued a citation to the person seen consuming beer and a warning to the person in possession of an open can of beer. Agent Chadwick gave the manager, Lisa Johnson, the Administrative Notice of an alleged violation.

2. Respondent's Evidence

Respondent's Exhibit No. 1 was as a diagram of the building and parking lot comprising the premises along with driveways and adjoining streets.

Mohammed Saidykhan testified that on March 16, 2000, he was employed by Respondent and was on duty at the premises. He stated that he had completed Seller/Server training two weeks prior to this incident. On the evening in question he had taken trash from the store to the trash receptacle on the Cullen Boulevard side of the parking lot. He used a broom to sweep trash from around a gasoline pump island that was closer to the street than to the store. He returned to the store carrying a dust pan and broom. Before entering the store he was stopped by a Commission agent who asked him if he had seen the above described group of three people drinking. He told the Commission agent that he had not.

Ms. Lisa Johnson testified that on March 16, 2000 she was employed by the Respondent and was on duty as the manager of the permitted premises. She stated that a regular customer pulled up to the store in a white truck and entered the store. The customer told her he had been crabbing and asked for a plastic bag to put some crabs in to give her. The witness stated that she went out to the truck to see the crabs and while at the truck saw no alcoholic beverage containers. About a minute later she returned to the store to serve another customer. The Commission agents approached her four or five minutes later. She denied seeing three people standing within two feet of the front door or in possession of open containers. She also denied selling any beer to any of the persons

approached by the Commission agent. She added that no agent asked her if she had sold alcoholic beverages to those persons.

IV. ANALYSIS AND RECOMMENDATION

A. Analysis

The Amended Notice of Hearing alleged that on March 16, 2000, "Permittee consumed or permitted the consumption of an alcoholic beverage on the premises of a package store" and that by doing so violated §§ 11.61 (b) (2) and 22.11 of the Code.

Section 22.11 provides that "Except as authorized under Section 52.01, no person may sell, barter, exchange, deliver or give away any drink or drinks of alcoholic beverages from a container that has been opened or broken on the premises of a package store"(Emphasis added). There was no evidence that any of sale, barter, exchange, delivery or gift of any drink or drinks took place. There was no evidence that if these acts had occurred that the drinks would have been from a container that had been opened or broken on the premises of a package store.

TABC may suspend or cancel a permit if a permittee is found to have violated a provision of the Code or a rule adopted by the Commission. TEX. ALCO. BEV. CODE ANN. §§ 6.01(b), 11.61(b)(2), and 61.71(a)(1). The preponderance of the evidence fails to show that the Respondent, its agents or employees violated Section 22.11 of the Code.

B. Recommendation

Because no violation of Section 22.11 of the Code was shown the ALJ recommends that no action be taken against Respondent's permit.

V. PROPOSED FINDINGS OF FACT

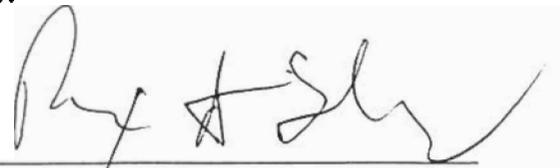
1. Landmark Industries Ltd., doing business as Timewise Food Stores #1301, Respondent, held on March 16, 2000, and still holds a Wine and Beer Retailers Off-Premise Permit issued by the Texas Alcoholic Beverage Commission.
2. The premises for which the permit is issued is 4811 Bellfort, Houston, Texas.
3. On March 16, 2000, an individual was observed by Commission agents, consuming a can of beer in the parking lot on the premises.

4. Respondent did not sell, barter, exchange, deliver or give away any drink or drinks from a container of beer that had been opened or broken on the premises of a package store.
5. On September 12, 2000, notice of the hearing to consider sanctions against Respondent was sent by certified mail, return receipt requested, to Respondent at 4811 Bellfort, Houston, Texas.
6. The Respondent or its agent received the notice of hearing.
7. The hearing to consider the allegation convened on January 25, 2000, before Administrative Law Judge Rex A. Shaver with the State Office of Administrative Hearings (SOAH) in the SOAH offices at 2020 North Loop West, Houston, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by its representative, Bob Duff.

VI. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV CODE ANN. §§6.01(b), and 11.61(b)(2).
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 Numbers 1-3, no violation of Section 22.11 of the Code was shown to have occurred.
5. Based on the foregoing Findings of Fact and Conclusions of Law no action is warranted against the Respondent's permit.

Signed this 1st day of October, 2001.



REX A. SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS