DOCKET NO. 603740

IN RE DEL PAPA DISTRIBUTING CO. L.P.	§	BEFORE THE
D/B/A	§	
PERMIT NO. BC-241174 & BB-241173	§	
	§	TEXAS ALCOHOLIC
	§	
JEFFERSON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-0026)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 13th day of January, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Stephen J. Burger. The hearing convened on October 28, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 28, 2004. 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, 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 General Distributor's License and Branch Distributors License are hereby **SUSPENDED.**

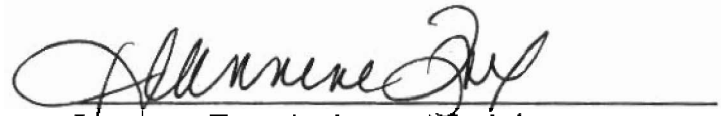
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of $6000.00 on or before the 3rd day of **March, 2005**, all rights and privileges under the above described will be **SUSPENDED** for a period of **four (4) days**, beginning at **12:01 A.M.** on the **10th** day of **March, 2005.**

This Order will become final and enforceable on <u>FEBRUARY 3, 2005,</u> 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 13th day of January, 2005.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

LT/yt

Stephen J. Burger
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE: (713) 812-1001

DEL PAPA DISTRIBUTING CO. L.P.
RESPONDENT
410 IH 10 South
Beaumont, Texas 77707
CERTIFIED MAIL NO. 7001 2510 0007 0098 7486
RETURN RECEIPT REQUESTED

E. Eugene Palmer
ATTORNEY FOR RESPONDENT
P. O. Box 1057
Austin, Texas 78767
VIA FACSIMILE: (512) 454-6973

Lindy To
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Beaumont District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCED

DOCKET NUMBER: 603740 REGISTER NUMBER:

NAME: DEL PAPA DISTRIBUTING CO. L.P. TRADENAME:

ADDRESS: 410 IH 10 South, Beaumont, Texas 77707

DATE DUE: March 3, 2005

PERMITS OR LICENSES: BC-241174 & BB-241173

AMOUNT OF PENALTY: $6000.00

Amount remitted $_____ Date remitted _____

If you wish to a 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 3rd DAY OF March, 2005, 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

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

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.

DOCKET NO. 458-05-0026

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
DEL PAPA DISTRIBUTING CO., L.P.	§	
LICENSE NOS. BC-241174 & BB-241173	§	
JEFFERSON COUNTY, TEXAS	§	
(TABC CASE NO. 603740)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff or Commission) brought this enforcement action against Del Papa Distributing Co., L.P. (Respondent), for allegedly selling or delivering an alcoholic beverage to an unlicensed business. The Staff recommended that Respondent's permit be suspended for 14 days, or that Respondent pay a fine of $1,500 per day in lieu of suspension. The Administrative Law Judge (ALJ) agrees with Staff's allegation that Respondent sold an alcoholic beverage to an unlicensed business, but the ALJ does not agree with the Staff's recommendation regarding the length of the suspension.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened on October 28, 2004, before ALJ Stephen Burger, at the offices of the State Office of Administrative Hearings in Houston (SOAH), Harris County, Texas. Staff was represented by Dewey Brackin, attorney. Respondent appeared and was represented by E. Eugene Palmer, attorney.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the Conclusions of Law.

II. LEGAL STANDARDS

When a distributor sells or delivers an alcoholic beverage to an unlicensed business, a violation of TEX. ALCO. BEV. CODE ANN. §§ 6.01, 61.71(a)(1), 61.74, 64.01, or 66.01 may have occurred. Such violations may be punished by cancellation or a maximum 60-day suspension of a license pursuant to TEX. ALCO. BEV. CODE ANN. § 61.74, or the Commission in lieu of suspension may assess a civil penalty pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64.

Additionally, TEX. ALCO. BEV. CODE ANN. § 61.86 provides that the TABC may suspend or revoke the license of a person who is the employer of or represented by the holder of an agent's beer license, only if an individual employed by the person in a supervisory position: (3) failed to take reasonable steps to prevent the act or omission.

TEX. ALCO. BEV. CODE ANN. §§ 61.031(b) states that the Commission "shall promptly notify each wholesaler, ... who regularly supplies retailers in the geographic area that the holder's retail license has expired or has been suspended."

Pursuant to the Commission's Rules, 16 TEX. ADMIN. CODE § 33.32, "notification to wholesalers of expired or suspended licenses or permits shall be by electronic publication of such information on the commission's Internet web page."

III. DISCUSSION

In this case, there was an allegation that Respondent, on October 25, 2002, sold $913.98 of alcoholic beverages to P&J Food Store, 670 Washington, Beaumont, Jefferson Co., Texas. On that date P&J Food Store had a permit, Q 217422, and a license, BF 258147, that had expired on August 30, 2002. The Commission further contends that Respondent failed to take reasonable steps to prevent the sale.

During the hearing, the Respondent stipulated to the delivery and sale of alcohol to P&J Food Store on October 25, 2002, as previously mentioned. The Respondent, however, argued that the TABC did not comply with the notification to Respondent as set forth in TEX. ALCO. BEV. CODE ANN. § 61.031(b). Therefore, Respondent argues that because the Commission did not properly notify Respondent of P&J Food Store's expired license and permit, Respondent was not in violation of selling to a business with an expired license or permit.

Respondent also argued it took reasonable steps to prevent the act or omission regarding the sale in question.

A. Evidence

The TABC presented three exhibits, all of which were admitted. Number one is the Commission's Offense Report; number two was the Respondent's October 25, 2002 invoice; and number three was the Commission's record of expired permits and licenses, 9/13/02 to 9/19/02. The Commission also presented Steven Poole, Commission Agent, as a witness.

The Respondent presented Bradley Wolfe, V.P. of Human Resources, and Keith McClain, a supervisor.

Agent Poole testified that, while conducting an out-of-business investigation of P&J Food Store on November 7, 2002, he discovered that Respondent had made a delivery of beer to P&J Food Store on October 25, 2002. P&J Food Store's permit expired on August 30, 2002. Agent Poole thereafter interviewed Keith McClain, who told him employees of Respondent had made the delivery on the date in question. Mr. McClain further informed Agent Poole that the drivers making the deliveries were instructed to check that the licenses and permits of the retail stores were current.

Bradley Wolfe, V.P. of Human Resources for Respondent, testified that the Director of the territory encompassing P&J Food Store was Keith McClain. To his knowledge, Directors are told by drivers if licenses are expired. He did not know of the Commission's web site that provides such information. He also stated that there was a training program for delivery drivers, at which time they would have been informed of the need to check permits and licenses when deliveries were made.

Keith McClain testified that he was the sales supervisor during the time in question. He testified that at the time in question, the company provided a monthly print-out for sales representatives of customers regarding licenses and permits. He does not believe that P&J Food Store was on the list before the October 25, 2002, delivery, and that the omission would have been an error. The first time he knew that P&J Food Store's permit was expired was sometime in November, 2002, and the first time he checked the Commission web site regarding license and permit expirations was the beginning of 2003. He also testified that Robert Cunningham was the supervisor of drivers for the area P&J Food Store was in at the time in question. Robert Cunningham did not testify.

IV. ANALYSIS

It is not disputed that Respondent is a distributor wholesaler. The only issues before the ALJ are whether the Commission's web page constituted notification pursuant to § 61.031 (b); and whether Respondent failed to take reasonable steps to prevent the act or omission.

Regarding the notification issue, the ALJ notes that 16 TAC § 33.32 (Rule 33.32) specifically refers to TEX. ALCO. BEV. CODE ANN. § 61.031(b) (Section 61.031(b)). The ALJ believes that Rule 33.32 speaks for itself. It clearly and unambiguously states that the expired licenses or permits contained in the Commission's Internet web page shall be the notification to wholesalers required by Section 61.031(b). The ALJ is not granted authority to rule on the validity of a rule. TEX. GOV'T CODE ANN. § 2001.038. The testimony of Agent Poole, and the Commission's exhibits clearly show that P&J Food Store's expired

license and permit were posted on the Commission's web page for the week of September 13-19, 2002, approximately one month prior to both the date of delivery of the alcohol on October 25, 2002, and prior to the date when the order was taken by Respondent's sales representative. The evidence further shows that Rule 33.32 was in effect November 21, 1999.

Respondent argues that the Commission's web page notification does not comply with Section 61.031(b), in that the web page does not "promptly notify each wholesaler...that the holder's retail license has expired...." Respondent argues that something akin to "specific, personal communication" is required. The ALJ notes that it is curious that in this case, a wholesaler of alcoholic beverages was not aware of a rule enacted by its regulating agency, from 1999 until 2002. Whether this is because of the agency's failure to communicate the rule to its regulated entities, or whether the Respondent failed to keep up with new laws affecting its business (note the axiom, "Ignorance of the law is no excuse"), is not a necessary finding for the ALJ in this matter. The ALJ finds more than sufficient evidence that the Commission gave the notice it was required to give to Respondent regarding the expired license.

Regarding whether the Respondent failed to take reasonable steps to prevent the sale on October 25, 2002, the ALJ notes that according to the testimony of Keith McClain, a supervisor of sales at the time in question, there were apparently three methods used by Respondent to assure that alcoholic products were not sold to purchasers without proper licenses or permits. The drivers are instructed to check the licenses or permits posted at the location. Additionally, Respondent had some type of monthly print-out that was circulated to sales supervisors which contained information as to purchasers licenses or permits. Finally, the sales representative who took the order from P&J Food Store about three days prior to the actual delivery in question would have had the opportunity to check the license or permit posted at the store.

Mr. McClain stated that he was in charge of sales for P&J Food Stores at the time, and apparently the name of P&J Food Stores did not appear on the internal list circulated monthly by Respondent. Mr.

McClain states there must have been a mistake by whoever put together the list by Respondent, but he did not know how this list was compiled, or who compiled it.

It is clear that the delivery drivers did not check the posted expired license when making the delivery, or if they did, they made the delivery in spite of the expired license. No delivery drivers testified.

Additionally, the sales representative, who took the order at P&J Food Store three days before the delivery, either did not check the posted expired license at the store, or if he did, took the order in spite of the expired license.

The first time Mr. McClain knew that P&J's license was expired was late November, 2002. He was not aware of the Commission's web page regarding the license status of purchasers until the beginning of 2003.

Bradley Wolfe did not know of the Commission's web page until this hearing. Mr. Wolfe also stated that directors in charge of drivers depend on the drivers to inform them of expired licenses or permits at the time of delivery.

After considering the evidence, the ALJ finds that Respondent did not take reasonable steps to prevent the sale of beer to P&J Food Store on October 25, 2002. The predominant method the Respondent had for checking retail licenses was for the delivery drivers and sales representatives to check the licenses at the stores at the time of sale, and at the time of delivery. The evidence showed this method failed.

The only other check by Respondent was the mysterious internal monthly print-out that Mr. McClain testified was originated by unknown administrative personnel for Respondent, and then circulated monthly to various sales personnel, including himself. Either that document, which was not presented at

the hearing, was incorrect, or Mr. McClain missed the expired license of P&J Food Store contained in that print-out.

Selling alcoholic beverages only to businesses that are properly licensed or permitted is one of the very essences of Respondent's business. The evidence shows that apparently no one at Respondent's business even knew about the Commission's web page, nearly three years after the rule was enacted. Had the Respondent been monitoring that web page, and informing their sales representatives, the sale that originated the delivery may not have been made in the first place. The ALJ finds that, considering all the evidence, the Respondent did not take reasonable steps to prevent the sale.

Regarding whether the delivery drivers to P&J Food Store on the date in question were individuals employed by a person in a supervisory position, the ALJ finds more than sufficient evidence that Mr. McClain, who testified, and Mr. Cunningham, who's name was testified to, were supervisors in charge of either the sales representative who took the order, or in charge of the delivery drivers who made the delivery in question.

Although the Commission requested a cancellation of Respondent's licenses for 14 days, or a $1,500 per day penalty in lieu of cancellation, the ALJ does not agree. After reviewing all the evidence, the ALJ notes that this is the first instance of such a violation by the Respondent. The amount of the sale was relatively small. The $21,000 penalty seems excessive under these circumstances. The ALJ would recommend a four day suspension, or $1,500 per day in lieu of suspension.

V. PROPOSED FINDINGS OF FACT

1. Del Papa Distributing Co., L.P., (Respondent), 410 IH-10 South, Beaumont, Jefferson Co., Texas 77707, holds a Branch Distributor's License and a General Distributor's License, BC-241174 and BB-241173, issued by the Texas Alcoholic Beverage Commission (Commission).

2. On September 13, 2004, the Commission sent a Notice of Hearing to Respondent.

3. The hearing was convened on October 28, 2004, at the offices of the State Office of Administrative Hearings in Houston, Harris County, Texas. Respondent appeared and was represented by E. Eugene Palmer, attorney. The Commission was represented by Dewey Brackin, attorney.

4. On October 25, 2002, employees of Respondent delivered alcoholic beverages valued at $913.98, to P&J Food Store, 670 Washington, Beaumont, Jefferson Co., TX (P&J Food Store).

5. On October 25, 2002, P&J Food Store's license and permit to sell alcohol, BF-258147 and Q-217422, were expired, and had expired, as of August 30, 2002.

6. As of September 9, 2002, P&J Food Store's expired permit and license BF-258147 and Q-217422, were listed as expired on the Commission's web page.

7. On or about October 23, 2002, Respondent's employee took an order for the sale of alcoholic beverages to P&J Food Store, in the amount of $913.98.

8. On November 7, 2002, P&J Food Store had posted at its location in Beaumont, Texas, an expired permit and license, BF-258147 and Q-217422.

9. On October 25, 2002, employees of Respondent delivering alcoholic beverages valued at $913.98, to P&J Food Store, 670 Washington, Beaumont, Jefferson Co., TX, failed to notice or failed to heed the expired license and permit posted at P&J Food Store.

10. On or about October 23, 2002, Respondent's employee who took an order for alcoholic beverages at the P&J Food Store, 670 Washington, Beaumont, Jefferson Co. TX, failed to notice or failed to heed the expired license and permit posted at P&J Food Store.

11. On or about October 25, 2002, Keith McClain was Respondent's employee and supervisor of sales for P&J Food Store, Beaumont, Texas.

12. Prior to the order taken for and delivery of alcoholic beverages by Respondent to P&J Food Store, 670 Washington, Beaumont, Jefferson Co., TX, on or about October 25, 2002, Keith McClain, a supervisor and employee of Respondent, failed to notice the expired license and permit listed in Respondent's internal monthly printout regarding retail licenses and permits of Respondent's customers, or the internal monthly printout failed to list P&J Food Store as having an expired license and permit.

13 As of October 28, 2004, the sale and delivery of alcoholic beverages from Respondent to P&J Food Store, Beaumont, Texas, was the only such violation by Respondent.

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, 61.71, and 61.73.

2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a Proposal for Decision containing Findings of Fact and Conclusions of Law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43, and TEX. GOV'T CODE ANN. ch. 2003 .

3. Proper and timely notice of the hearing was given to Respondent pursuant to TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55.

4. Pursuant to the Proposed Findings of Fact, and TEX. ALCO. BEV. CODE ANN. §§ 6.01, 61.71(a)(1), 61.74, 64.01, and 66.01, on October 25, 2002, Respondent sold or delivered alcoholic beverages to a business that had an expired license and permit.

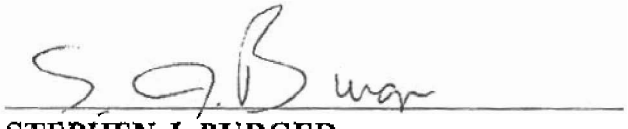
5. Pursuant to the Proposed Findings of Fact, and TEX. ALCO. BEV. CODE ANN. § 61.86, an individual employed by the Respondent in a supervisory position failed to take reasonable steps to prevent the October 25, 2002, sale by Respondent to a business that had an expired license or permit.

6. Pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.031(b), the Commission promptly notified Respondent, a wholesaler who regularly supplies retailers in the geographic area, that the holder's retail license was expired or had been suspended.

7. Based on the foregoing Proposed Findings of Fact and Proposed Conclusions of Law, a four day suspension of Respondent's license is warranted pursuant to TEX. ALCO. BEV. CODE ANN. § 61.74.

8. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, Respondent should be allowed to pay a $1,500 per day civil penalty in lieu of suspension of its license.

SIGNED December 28, 2004.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS