

On August 29, 2006, Staff sent an amended notice of the hearing by certified mail, return receipt requested, to Respondent at the same address. The only substantive difference between the notice of hearing and the amended notice of hearing is that a reference to TEX. ALCO. BEV. CODE ANN. (Code) § 101.64 was deleted from the amended notice of hearing. Based on these two notices, the ALJ finds that Respondent had adequate notice, as required by the Administrative Procedures Act, TEX. GOVT. CODE ANN. Ch. 2001.

The hearing was held on September 14, 2006, before the undersigned ALJ at the State Office of Administrative Hearings, 300 W. 15th Street, 4th Floor, Austin, Texas. Staff attorney W. Michael Cady represented Staff. After evidence was received, the hearing concluded and the record closed the same day. Other issues related to notice and jurisdiction are addressed only in the Findings of Fact and Conclusions of Law.

II. APPLICABLE LAW

The Code prohibits a permittee from conducting business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Place or manner violations may be sanctioned by suspension of not more than 60 days or cancellation of a permit.²

A permit holder commits a place or manner violation and is subject to suspension for up to 60 days if any public decency offense described in TEX. PEN. CODE ANN. Ch. 43 is committed on the premises.³ It is a criminal offense to promote or possess with intent to promote any obscene material.⁴ A person who promotes or wholesale promotes obscene material in the course of his

² Code § 61.71(a).

³ 16 TEX. ADMIN. CODE § 35.31(c)(12).

⁴ As defined in TEX. PEN. CODE ANN. § 43.21, obscene material is anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation . . . or in any other manner, and which:

(A) the average person, applying contemporary community standards, would find that taken as a whole

business is presumed to do so with knowledge of its content and character.⁵

III. EVIDENCE PRESENTED

TABC Agent Tricia Rutledge testified that on January 7, 2006, she saw magazines that were visible to the public in Respondent's convenience store. Agent Rutledge purchased and viewed some of the magazines. She explained to the clerk on duty why the magazines were obscene and told him it was unlawful to display them because they showed graphic depictions of people engaging in sexual activity, including penetration. That day, Agent Rutledge wrote Respondent an administrative warning.⁶

On March 9, 2006, Agent Rutledge returned to Respondent's premises and saw the same type of magazines in the same place in Respondent's store. She purchased magazines that showed sexual penetration, masturbation, lewd exhibition of genitals, and male and female genitals in a state of sexual stimulation or arousal.⁷ The magazines Agent Rutledge purchased were wrapped in packages with clear plastic; three or four magazines were in each package.⁸ A printed sign on the rack where the magazines were displayed stated, "Multi-Pak 4 for 9.99."

To address the appropriateness of the requested sanction, Staff offered evidence of a prior

appeals to the prurient interest in sex;

(B) depicts or describes: (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse . . . ; or (ii) patently offensive representations or descriptions of masturbation, . . . lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, . . . or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

5 TEX. PEN. CODE ANN. § 43.23(a) and (c)(1).

6 Ex. 4.

7 Copies of pages from the magazine were admitted as Ex. 3.

8 The magazines and the rack where they were displayed are depicted in a photograph admitted as Ex. 5.

determination against Respondent. Based on events that occurred in June 2005, Staff alleged that Respondent, "allowed the consumption of an alcoholic beverage on the premises of an off-premise licensed location" and also "allowed an open container on the premises of an off-premises licensed location." Salim Mohammad, an officer of the Respondent corporation, signed an agreement and waiver of hearing in which he did not admit the allegations but waived the corporation's right to a hearing and accepted a six-day suspension as a penalty. On April 20, 2006, the Commission's Administrator found that Respondent violated provisions of the Code, and the Administrator ordered suspension of Respondent's license for six days, or in the alternative, ordered Respondent to pay a civil penalty in the amount of \$900.⁹

In light of the prior violation and Respondent's display and promotion of the obscene material that is the subject of this case, Staff asked for 30-day suspension of Respondent's license, or in lieu of suspension, a penalty of \$200 a day, *i.e.*, a penalty of \$6,000.

IV. DISCUSSION AND ANALYSIS

Photographs taken from the magazines depict patently offensive sex acts, including sexual intercourse, masturbation, lewd exhibition of genitals, and male and female genitals in a state of sexual stimulation or arousal. Although there was no evidence regarding contemporary community standards, Agent Rutledge expressed her opinion that the materials were obscene under the Texas Penal Code definition. Thus, it is reasonable to infer that the average person, applying contemporary community standards, would find the materials appeal to the prurient interest in sex and, taken as a whole, lack serious literary, artistic, political, and scientific value. Accordingly, the magazines are obscene materials, as that term is defined in Penal Code. In addition, the magazines were displayed in a public manner and priced for sale. By possessing for sale and selling obscene materials on the premises, Respondent violated TABC rules, and this conduct constitutes a place and manner violation in contravention of the Alcoholic Beverage Code. Therefore, Respondent's permit is subject to suspension or cancellation.

9 Ex. 2.

Respondent has had one prior suspension and was warned that displaying and selling the magazines on the premises was a violation. After receiving the warning, Respondent continued to possess and sell the prohibited materials. In the ALJ's opinion, this is an aggravating circumstance of the violation.¹⁰ After considering these factors and the evidence, the ALJ recommends that the TABC permit issued to Respondent be suspended for 30 days or, in the alternative, Respondent be allowed to pay a civil penalty in the amount of \$6,000.

V. FINDINGS OF FACT

1. Savera Enterprises, Inc. d/b/a Duke Stop #3 (Respondent) holds Wine and Beer Retailer's Off-premise Permit No. BQ575741 issued by the Texas Alcoholic Beverage Commission (Commission).
2. Respondent operates a convenience store located in Austin, Texas.
3. On January 7, 2006, a Commission agent saw magazines in Respondent's store that were visible to the public, and the agent purchased some of the magazines.
4. After viewing some of the magazines, the agent told the clerk on duty that the magazines were obscene, and it was unlawful to display them because they showed graphic depictions of people engaging in sexual activity, including penetration.
5. The agent wrote Respondent an administrative warning for a "place or manner" violation.
6. On March 9, 2006, the agent returned to Respondent's premises and saw the same type of magazines in the same place in Respondent's store.
7. Again, the agent purchased some of the magazines, which included photographs depicting sexual penetration, patently offensive depictions of masturbation, lewd exhibition of genitals, and male and female genitals in a state of sexual stimulation or arousal.
8. The average person, applying contemporary community standards, would find the materials appeal to the prurient interest in sex and, taken as a whole, lack serious literary, artistic, political, and scientific value.

¹⁰ Pursuant to Code § 11.641, the amount of civil penalty must be appropriate for the nature and seriousness of the violation. In determining the amount of the civil penalty, the Commission or Administrator must consider: (1) the type of license or permit held; (2) the type of violation; (3) any aggravating or ameliorating circumstances concerning the violation, including those enumerated in Section 11.64(c); and (4) the permittee's or licensee's previous violations.

9. The magazines the agent purchased were wrapped in packages with clear plastic; three or four magazines were in each package.
10. A printed sign on the rack where the magazines were displayed stated, "Multi-Pak 4 for 9.99."
11. On July 25, 2006, Staff sent the notice of hearing to Respondent at its address of record, 2020 E. 7th St., Austin, Texas 78702, by certified mail, return receipt requested. The notice was signed by a person at Respondent's address on July 26, 2006, and the certified mail receipt was attached to the hearing notice.
12. On August 29, 2006, Staff sent an amended notice of the hearing by certified mail, return receipt requested, to Respondent at the same address. The only substantive difference between the notice of hearing and the amended notice of hearing is that a reference to TEX. ALCO. BEV. CODE ANN. § 101.64 was deleted from the amended notice of hearing.
13. The hearing was held on September 14, 2006, at the State Office of Administrative Hearings, 300 W. 15th Street, 4th Floor, Austin, Texas. Staff attorney W. Michael Cady represented Staff. Respondent was not represented at the hearing.
14. On April 20, 2006, the Commission's Administrator found that, based on events that occurred in June 2005, Respondent violated several provisions of the Texas Alcoholic Beverage Code. The Administrator ordered suspension of Respondent's license for six days, or in the alternative, ordered Respondent to pay a civil penalty in the amount of \$900.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. Ch. 5 and § 6.01.
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. TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042.(5).
3. Adequate and timely notice of hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the foregoing Findings of Fact, Respondent promoted, on the premises, obscene material, the content and character of which was known to Respondent, in violation of 16 TEX. ADMIN. CODE § 35.31 and TEX. ALCO. BEV. CODE ANN. § 61.71(a)(17).

5. Based on the foregoing Findings of Fact and Conclusions of Law, TABC should suspend Respondent's Off-premise Permit No. BQ575741 for a period of 30 days or in lieu of the suspension, impose a \$6,000 civil penalty, pursuant to TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(17), 11.64, and 11.641.

SIGNED October 26, 2006.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGSy