

**DOCKET NO. 576676**

IN RE AMERICAN NEWSTAND #1 INC.	§	BEFORE THE
D/B/A AMERICAN NEWSTAND #1	§	
PERMIT NO. Q-247658	§	
LICENSE NO. BF299047	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0190)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 12th day of June 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya A. Cooper. The hearing convened on February 22, 2000 and the record was closed on April 6, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 9, 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.

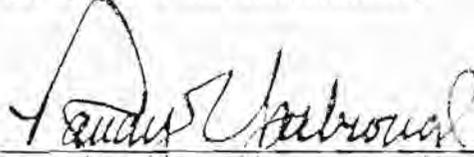
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit No. Q-247658 and License No. BF299047 are herein **SUSPENDED for seven (7) days beginning on August 19, 2000, unless a civil penalty in the amount of \$1,050.00 is paid before August 12, 2000.**

**This Order will become final and enforceable on July 3, 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 12th day of June, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya A. Cooper  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (817) 626-7448**

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

Steven H. Swander  
**ATTORNEY FOR RESPONDENT**  
505 Main Street, Ste. 250  
Fort Worth, Texas 76102  
**CERTIFIED MAIL/RRR NO. Z 473 040 297**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Ft. Worth District Office

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge



May 9, 2000

Doyne Bailey  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive, Suite 160  
Austin, Texas 78731

CERTIFIED MAIL, Z 283 051 955  
RETURN RECEIPT REQUESTED

**RE: Docket No. 458-00-0190; Texas Alcoholic Beverage Commission vs. American Newstand No. 1, Inc., d/b/a American Newstand No. 1; TABC Case No. 576676**

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Steven Swander, Attorney for Respondent. For reasons discussed in the proposal, I recommend that Respondent's permits be suspended for seven (7) days and that Respondent be allowed to pay a civil penalty in lieu of any suspension in the amount of \$1,050.00 (One Thousand Fifty Dollars).

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

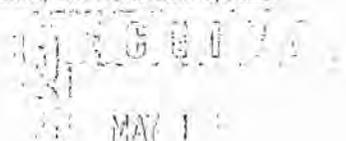
Sincerely,

Tanya A. Cooper,  
Administrative Law Judge

TC:ds

Enclosure

xc: Shanee Woodbridge, State Office of Administrative Hearing - **Regular Mail**; Timothy Griffith, Staff Attorney, Texas Alcoholic Beverage Commission - **Regular Mail**; Steven Swander, Attorney for Respondent, 505 Main Street, Suite 250, Fort Worth, Texas 76102- **CMRR # Z 283 051 956**



TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
AMERICAN NEWSTAND NO. 1, INC. D/B/A AMERICAN NEWSTAND NO. 1 (TABC CASE NO. 576676)	§ § §	ADMINISTRATIVE HEARING

**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (TABC) brought this disciplinary action against American Newstand No. 1, Inc., d/b/a American Newstand No. 1 (Respondent), alleging that Respondent, its agent, or its employee allowed lewd or vulgar entertainment on the licensed premises in violation of the Texas Alcoholic Beverage Code (Code). TABC Staff requested that Respondent's permits be suspended for seven days, or that Respondent pay a civil penalty in lieu of any suspension in the amount of \$1050. This proposal finds that Respondent's agent or employee allowed lewd and vulgar entertainment by displaying sexually graphic materials on the premises. The Administrative Law Judge (ALJ) recommends that Respondent permits be suspended for seven days, and that Respondent be allowed to pay a civil penalty in lieu of any suspension in the amount of \$1050.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5 and §§ 6.01, 11.61, and 61.71(Vernon 2000). The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. § 2003.021(Vernon 2000). There are no contested issues of notice or jurisdiction in this proceeding.

On February 22, 2000, a hearing convened before Tanya Cooper, Administrative Law Judge (ALJ), of the State Office of Administrative Hearings, at 2100 North Main Street, Suite 10, Fort Worth, Tarrant County, Texas. Petitioner was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared and was represented at the hearing by Steven H.

Swander, Attorney at Law. The record was closed on April 6, 2000.

### APPLICABLE LAW

TABC is authorized to suspend a permit for not more than sixty days if it is found that the permittee violated a provision of the Code or TABC rules. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 61.71(a)(1)(Vernon 2000). Further, a permit issued pursuant to the Code may be suspended if it is found that the place or manner in which the permittee conducts his business warrants the suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(7) and 61.71(a)(17)(Vernon 2000). TABC alleges in this instance that Respondent allowed lewd or vulgar entertainment or acts on the premises<sup>1</sup> contrary to the Code; and further because of this on-going activity, Respondent was conducting its business in a manner contrary to the public's general welfare.

### EVIDENCE AND ANALYSIS

Respondent holds a Wine Only Package Store Permit, Q-247658, and a Beer Retailer's Off-Premises License, BF-299047, for a premises located at 5155 E. Lancaster, Fort Worth, Tarrant County, Texas. TABC alleges that Respondent's business has been conducted in a manner contrary to the public's general welfare and sense of decency by permitting lewd or vulgar entertainment or acts on the premises. Respondent is alleged to have provided access to this entertainment by possessing and displaying, for sale in the licensed premises, graphic materials containing pictures that are immoral, indecent, lewd, or profane.

On October 2, 1997, TABC agent, M. Montero, entered the licensed premises on an inspection visit. While inside the premises, Agent Montero observed a display of books on the back wall of the store. On the books' covers were pictures depicting sexual intercourse, sadism, masochism, lewd exhibition of genitals, sexual stimulation, and sodomy. Along with the photographic depictions and book titles, each of the covers also contained a descriptive phrase, "For the Entertainment of Adults Only."

Each book was wrapped in a clear plastic that allowed the photographs to be fully viewed. The display was behind a counter, but readily seen from public areas in the store, particularly the area directly in front of a wall cooler where alcoholic beverages were stored on the premises.

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<sup>1</sup>No person authorized to sell beer at retail... may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(6) permitting lewd or vulgar entertainment or acts;

... TEX. ALCO. BEV. CODE ANN. § 104.01(6)(Vernon 2000).

Agent Montero testified that he has been involved in enforcement activities with the TABC for over five years. He is a resident of Tarrant County, Texas, and stated that he believes he is familiar with the standards an average person in Tarrant County would apply when evaluating the materials displayed by Respondent. Agent Montero opined that the photographic display was obscene having no redeeming value for scientific or literary purposes and appealed to prurient interests in sex. Based upon this belief, Agent Montero confiscated the display items from the licensed premises.

Respondent contended that no evidence was presented of the violation alleged in TABC's Notice of Hearing because no lewd or vulgar acts were ongoing on the licensed premises when Agent Montero was present. Further, Respondent argues that books contained within a display could not, by definition, be contrary to § 104.01(6) of the Code because they are inanimate objects; and thus incapable of providing live entertainment. Respondent's position, as stated in its post-hearing brief, is that § 104.01(6) of the Code deals only with live acts or entertainment performed by persons. Respondent suggests in its argument that a distinction must be drawn in this case between lewd acts and merely the photographic depictions of sexuality displayed on these books' covers.

The central question to be determined in this case is whether a book, and specifically a book's cover standing alone, can be considered entertainment. "Entertainment" as defined in Webster's Collegiate Dictionary, Tenth Edition, as the act of entertaining by something diverting or engaging such as a public performance or a light comic or adventure novel. Therefore using this definition, entertainment may certainly be associated with live performances by individuals, but it is also related to objects, such as novels or other print media. The purpose of entertainment is to provide distraction, diversion, enjoyment, pleasure, relaxation, or relief. Any of these various states of being can be attributable in people from certain objects, such as a favorite possession, animals, such as with pets, or from the conduct or activities of other persons. As a result, books and even book covers alone, may be considered an entertainment if the book, or its cover, is capable of providing or producing any of the states of being listed above.

Having determined that entertainment may include print items or materials, the next question for consideration is whether these specific book covers are entertainment, and if so, was this entertainment lewd or vulgar. In this situation, the book covers submitted into evidence self-describe themselves as entertainment for adults. The photographs on the covers of these books, as prominently displayed on the licensed premises, certainly were capable of diverting or engaging a patron's attention when displayed among other items for sale on the licensed premises such as newspapers, magazines, crossword puzzle books, or baseball cards.

The photographs on the book covers were sexually graphic depicting intercourse, sodomy, sadism, masochism, genitals, and sexual stimulation. The book titles<sup>2</sup> are salacious describing the themes depicted in the accompanying photographs on each book's cover. In summary, these book

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<sup>2</sup>Illustration of some titles are: "*Ladies Enslaved, Claudia Needs Pain,*" "*Tie Me, Take Me,*" and "*Punishing His Mistress.*"

covers are designed to attract individuals that are pursuing entertainment via reading about activities that general community standards would deem immoral, indecent, or obscene. Respondent's act of displaying these materials for sale was permitting lewd entertainment on this premises. As a result, Respondent was conducting its business in a manner that was contrary to the public's sense of decency.

### RECOMMENDATION

The ALJ recommends that Respondent's permits be suspended for seven days, and that Respondent be allowed to pay a civil penalty of \$1050 in lieu of suspension, for the reasons stated above. Any other requests for entry of specific findings of fact or conclusions of law, any other requests for general or specific relief, if not expressly set forth below, are denied.

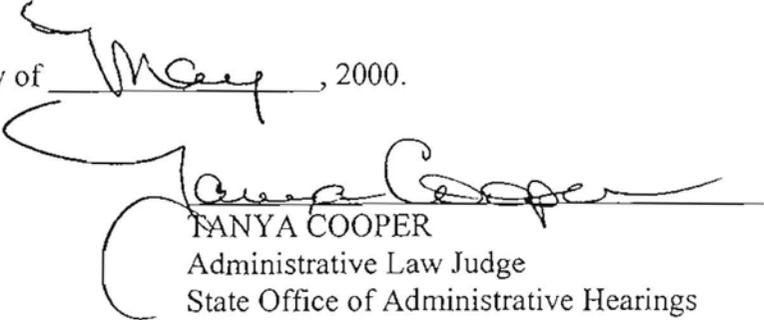
### FINDINGS OF FACT

1. American Newstand No. 1, Inc., d/b/a American Newstand No. 1 (Respondent) holds a Wine Only Package Store Permit, Q-247658, and Beer Retailer's Off-Premises License, BF-299047, for a premises located at 5155 East Lancaster, Fort Worth, Tarrant County, Texas.
2. On January 25, 2000, the Texas Alcoholic Beverage Commission (TABC) gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing. Respondent was represented at the hearing by counsel, Steven H. Swander.
3. On October 2, 1997, TABC agent, M. Montero, was on the licensed premises during an inspection visit, and while on the premises, he observed a display of books with covers containing photographs that depicted sexual intercourse, sadism, masochism, lewd exhibition of genitals, sexual stimulation, and sodomy.
4. The book covers contained, in addition to the graphic pictures described in Finding of Fact 3, salacious titles and the phrase "For the Entertainment of Adults Only."
5. These items were displayed prominently for sale on the licensed premises, with other types of reading materials, such as newspapers and magazines.
6. Agent Montero confiscated the books exhibiting the lewd and vulgar covers because he believed the entertainment materials were obscene based upon his experiences working in law enforcement for several years and living within the general community where Respondent's licensed premises is located.
7. Based upon Findings of Fact 3, 4, 5, and 6, Respondent allow lewd and vulgar entertainment on the premises that was offensive to public decency.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5, §§ 6.01, 11.61, and 61.71(Vernon 2000).
2. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Ch. 2003 (Vernon 2000).
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 through 7, Respondent permitted lewd or vulgar entertainment on the licensed premises, in violation of TEX. ALCO. BEV. CODE ANN. § 104.01(6)(Vernon 2000).
5. Based on Findings of Fact Nos. 3 through 7, and Conclusion of Law 4, Respondent operated its business in a manner contrary to the public's general welfare and sense of decency, in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61 and 61.71(Vernon 2000).
6. Based on Findings of Fact Nos. 3 through 7, and Conclusions of Law No. 4 and 5, Respondent's Wine Only Package Store Permit, Q-247658, and Beer Retailer's Off-Premises License, BF-299047, should be suspended for seven days.
7. Based on Conclusion of Law 6, Respondent should be allowed to pay a civil penalty, in lieu of suspension, in the amount of \$1050. TEX. ALCO. BEV. CODE ANN. § 11.64(a)(Vernon 2000).

SIGNED this 9<sup>th</sup> day of May, 2000.

  
TANYA COOPER  
Administrative Law Judge  
State Office of Administrative Hearings