

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
CHRISTOPHER W. TARBEL DBA INDUSTRIAL SHELL PERM NO. BQ-192812 DALLAS COUNTY, TEXAS (TABC CASE NO. 576927)	§ § § § §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Christopher W. Tarbel DBA Industrial Shell (The Permittee) for paying a beer distributor for the purchase of beer with a check for which funds were insufficient. The Permittee appeared at the hearing and requested leniency for the reasons discussed in Paragraph III (below). This Proposal for Decision recommends that Permittee be issued a warning.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding, and they were stipulated to on the record. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened on March 4, 1998, at the offices of the State Office of Administrative Hearings in Dallas, Dallas County, Texas. The Staff of the Commission (Staff) was represented by its counsel, Gayle Gordon. The Permittee appeared and represented himself.

II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS

There was one allegation in this proceeding, asserting that Permittee or its agent or its employee paid a beer distributor for beer with a check that was subsequently returned for insufficient funds. It is a violation of TEX. ALCO. BEV. CODE ANN. (Code) §61.73(b) for a permittee to give a beer distributor a check for payment of beer which is dishonored when presented for payment.

III. CHECK FOR INSUFFICIENT FUNDS

Staff's documentary evidence (TABC Exhibit 3), together with the testimony of Permittee, proved that Permittee committed one violation of (Code) §61.73(b) while writing a check for beer to Miller Of Dallas on October 27, 1997, which was subsequently returned for insufficient funds. The check was written by Permittee's agent, Mark Ledbetter.

Permittee and Mr. Ledbetter, who is Permittee's brother-in-law, testified that Permittee had contracted Multiple Sclerosis several years ago, but the disease was presently in remission. At one time, Permittee owned four Shell Stations, but as a result of the disease has been unable to conduct his affairs. Two of the stations have been sold and a third is on the market. Ledbetter had been trying to assist Permittee for the last year or so and was aware that there was a cash-flow shortage

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and attempted to move money into the correct account. Permittee has been licensed for 13 to 14 years and this is the only infraction of the rules in which he has ever been involved. At approximately the time the violation occurred, Mr. Ledbetter came to work for Permittee full time, and he now has help in keeping track of how his business is being run. Prior to that, since the onset of his disease approximately four years ago, his business affairs became somewhat muddled, although he was doing the best he could under the circumstances. He further testified that with his present full-time assistant, a reoccurrence of this situation should be preventable. The returned check and bank charges were paid by him.

IV. SANCTIONS AND RECOMMENDATION

As described in the Findings of Fact, the Permittee committed one violation of (Code) §61.73(b) while writing a check for beer which was subsequently returned for insufficient funds. The Permittee, his agent, servant or employee wrote the check. The Permittee is responsible for his own acts and the acts of his agents.

In this case, the Staff Attorney stated that her client was asking for a suspension of up to five days. Both parties requested that the ALJ review the facts in the light of §11.64 of the Code, "ALTERNATIVE TO SUSPENSION, CANCELLATION." Subsection (b) of that section allows the commission or administrator to "relax any provision of the Code relating to the suspension or cancellation of the permit or license and assess a sanction the commission administrator finds just under the circumstances . . ." Subsection (C) of that section states that the application of subsection (B) is justified if it is found "(1) that the violation could not reasonably have been prevented by the Permittee or licensee by the exercise of due diligence . . ." It is clear from the testimony that as a result of his disease, Permittee is in a financial bind and his business is diminishing. In addition to the disease, the Administrative Law Judge feels constrained to consider Permittee's past record, (one infraction in approximately thirteen years), and the extenuating circumstances under which the infraction occurred, together with the fact that it appears that the problem has been corrected. The Administrative Law Judge feels that this violation did not occur due to a lack of the exercise of due diligence, and the provisions of §11.64 noted above should govern this particular case.

V. FINDINGS OF FACT

1. Christopher W. Tarbel, DBA Industrial Shell holds Wine Beer Off-Premise Permit No. BQ-192812 for the premises known as Industrial Shell, located at 707 North Industrial, Dallas, Dallas County, Texas.
2. On February 13, 1998, the Staff sent a notice of hearing regarding an alleged violation of the Texas Alcoholic Beverage Code to the Permittee, via certified mail, return receipt requested.
3. The hearing on the merits was held on March 4, 1998 at the offices of The State Office of Administrative Hearings, Dallas, Dallas County, Texas. The Staff was represented by its counsel, Gayle Gordon. The Permittee appeared on his own behalf.
4. The Permittee, his agent, servant, or employee issued a check on or about October 27, 1997, in the amount of \$1,004.95 to Miller Of Dallas, Inc.
5. The check described in finding 4 was written for beer.

6. The check described in finding 4 was returned on or about November 6, 1997, for insufficient funds.
7. The Permittee has contracted multiple sclerosis with a resulting detrimental effect on his ability to conduct his business affairs.
8. As a result of his disease, Permittee's business had dwindled, and he has been forced to sell or attempt to sell all but one of his business locations.
9. Permittee has taken steps to insure that an infraction such as this does not reoccur.
10. Permittee has been licensed for approximately 13 years and this is the only infraction in which he has ever been involved.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) §§6.01, 61.71, and 61.73 (Vernon 1998).
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. GOV'T CODE ANN. Ch 2003 (Vernon 1999).
3. Notice of the hearing was provided as required by the Administrative Procedure Act. TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 1999).
4. The Permittee, its agent, servant, or employee gave one check in payment for beer, which was dishonored for insufficient funds when it was presented for payment, in violation of Code §61.73(b).
5. Based on the foregoing Findings and Conclusions, a Warning should be issued to Permittee pursuant to §11.64 of the Code, such Warning being the minimum penalty suggested in §37.60 of the Texas Alcoholic Beverage Commission Rules.

SIGNED THIS 26th day of February, 1999


Mark S. Richards
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS