DOCKET NO. 458-98-1175

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	OF
	§	
ABINITIO INC.,	§	
DBA THE SALOON DALLAS	§	
PERM NOS. MB-268232 & LB-268233	§	
DALLAS COUNTY, TEXAS	§	
(TABC CASE NO. 578381)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Abinitio, Inc., DBA The Saloon Dallas (Permittee) for paying a beer distributor for the purchase of beer with a check for which the funds were insufficient. The Permittee appeared at the hearing through counsel and on the record admitted and stipulated to the fact that the allegation in the notice of hearing was true and correct and that the infraction had, in fact, occurred. The Permittee stated that it was present in order to present evidence in mitigation of damages only, and specifically asked the ALJ to impose a reasonable civil penalty and not to cancel its license. This proposal for decision recommends a 30-day suspension or a civil penalty of $3,750.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. 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 August 5, 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 it counsel, Dewey Brackin. The Permittee was represented by its counsel, Stephen Shaw.

II. THE ALLEGATIONS AND APPLICABLE STATUTORY PROVISIONS

There was one allegation in this proceeding, asserting the 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. Such a violation may be punished by cancellation, a maximum 60-day suspension of a permit or, pursuant to Code Section 11.64, payment of a civil penalty in lieu of suspension of the permit.

III. EVIDENCE

As noted above, it was stipulated in open court that Permittee committed a violation of Code 61.73 (b) by writing a check for beer on February 12, 1998, to Ben E. Keith of Dallas, Texas in the amount of $209.55, which was subsequently returned for insufficient funds. This case differs from a normal cash law violation due to occurences which transpired after return of the check and which are briefly outlined in the following paragraphs.

Wayne Wilson, major stock holder, and the President of Permittee, testified on its behalf. The relevant portion of Staff's documentary evidence includes a written statement on a form purporting to come from NationsBank (the bank which dishonored the check), which stated that the bank had been in error in returning the check for insufficient funds, (TABC Exhibit 4), and a Deposition by Written Questions propounded by Staff to the President of the Southwest Region of NationsBank, who had purportedly signed the statement of bank error. The pertinent answers to written questions revealed that the Deponent did not sign nor authorize his signature to be placed on the statement, that the statement is not on a form used by NationsBank, that the check in question had been dishonored for insufficient funds, that this was not a bank error, and that his signature had been forged on the statement.

Mr. Wilson testified that his club manager, Lucas Ianunu, had handled this matter and he had discussed it with Ianunu; that Ianunu told him he did not know where the form came from; that it was sitting on the fax machine one day when he came in, and without further inquiry, he simply faxed it to TABC; and that he, Ianunu, does not know where it originated and that he himself did not sign it. Mr. Wilson further testified that he is an investor who resides in California and was in California during the time these transactions occurred; that while he had been made aware of the returned check, he had no absolutely no knowledge of the circumstances surrounding the statement of bank error other than what he had subsequently been told by Ianunu; that he thinks the fax may have come either from the parent company of Permittee, of which he is majority owner, or in fact from NationsBank as a result of someone there doing a "favor" for Permittee. He has no evidence that it came from the bank. Some thirty-eight people have access to the fax machines at his company.

IV. DISCUSSION

At the outset, it should be noted that, while Mr. Wilson's testimony was credible, the story that his manager related to him and the theory, (which he did not insist upon), that someone at the bank may have done Permittee a favor, were not. It is preposterous to assume that a bank employee would jeopardize his position and risk possible criminal charges by forging the name of a high-ranking bank officer to a statement concerning a relatively small bounced check, simply to do a favor for Permittee. Additionally, it is difficult to accept, and this ALJ does not, the statement of the club manager that one day he walked into his place of business, found the statement of error on the fax machine, and, without further ado or inquiry, simply sent it to TABC. As a result of the actions of Permittee, its agents, servants or employees, this simple case was made complicated, and Staff was put to undue and unwarranted time and expense with discovery and trial. Staff stated on the record, without objection or contradiction, that it had originally simply asked for a $450.00 fine. Moreover, it does not appear that Permittee's President has much confidence in the disingenuous story related to him by his manager. In closing argument, Permittee asked the court to "allow us to deal with our

manager and discipline him in our own way," while requesting it be allowed to pay a penalty but not have its permit canceled. The manager himself did not appear to testify; as noted above, Permittee's President appeared to be highly credible, and the Administrative Law Judge is convinced that he had no knowledge of the subterfuge which was attempted in this case.

V. SANCTIONS AND RECOMMENDATION

As described in the Findings of Fact, the Permittee committed a violation of (Code) §61.73(b) while writing a check for beer which was returned for insufficient funds. The infraction was exacerbated by a subsequent action of Permittee. The Permittee is responsible for its own acts and the acts of its agents, servants or employees.

In this case, the Staff recommended cancellation of the permits or in the alternative, a 60-day suspension or $4,500.00 fine. Due to the circumstances discussed above, something more than a minimum penalty is warranted. However, the Administrative Law Judge feels that an agent, servant or employee of the Permittee violated the Code without knowledge of the Permittee and that the alternatives suggested in Section 11.64(b) and (c) of the Code should be considered. There was no testimony as to whether a civil penalty would have any adverse economic impact upon Permittee; to the contrary, Permittee agreed that it should pay a fine, its primary concern being retention of its Permit. The Administrative Law Judge feels that under the facts stated above, a 30 day suspension of the permits, or, in lieu thereof, a civil penalty in the amount of $3,750.00 is warranted.

VI. FINDINGS OF FACT

1. Abinitio, Inc., DBA The Saloon Dallas, holds Texas Alcoholic Beverage Commission (TABC) Mixed Beverage Permit No. MB-268232 and Mixed Beverage Late Hours Permit No. LB-268233 for the premises known as the Saloon Dallas, located at 5736 E. Lovers Lane, Dallas, Dallas County, Texas.

2. On June 22, 1998, the Staff sent a notice of hearing regarding alleged violations of the Texas Alcoholic Beverage Code to the Permittee via certified mail, return receipt requested.

3. The hearing on the merits was held on August 5, 1998, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. The Staff was represented by its counsel, Dewey Brackin. The Permittee was represented by its counsel, Stephen F. Shaw.

4. The Permittee, its agent, servant or employee issued a check on or about February 12, 1998, in the amount of $209.55 to Ben E. Keith Company of Dallas, Texas.

5. The check described in Finding 4 was written for beer.

6. The check described in Finding 4 was returned by the drawee for insufficient funds.

7. An agent, servant or employee of Permittee sent a false statement in writing to TABC claiming the allegation of insufficient funds was false, and had occurred due to bank error.

8. The false statement was faxed to TABC by Permittee's agent, servant or employee on June 11, 1998.

9. The false statement was contained on what appeared to be a typed form with "Nation's Bank" filled in at the top, and contained all information relevant to the transaction, (Permittee's name and address, amount, date and signator of check), relative to the infraction.

10. The fase statement contained a forged signature purporting to be that of a bank officer.

VII. 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 1998).

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 1998).

4. The Permittee, its agent, servant, or employee gave a 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 30-day suspension of the permit is warranted. 16 TEX. ADMIN. CODE §37.60.

6. Pursuant to Code §11.64, the Permittee should be allowed to pay a $3,750.00 civil penalty in lieu of suspension of its permit.

SIGNED THIS 26th day of February, 1999

Sarah G Dawson for

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