

DOCKET NO. 583498

IN RE JOSE ALFREDO MARTINEZ	§	BEFORE THE
D/B/A JOE'S FOOD MART	§	
PERMIT NO. BF420964	§	
	§	TEXAS ALCOHOLIC
	§	
BEXAR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-1551)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 3RD day of April, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Ruth Casarez. The hearing convened on October 18, 1999 and adjourned October 18, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on February 29, 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. 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, 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.

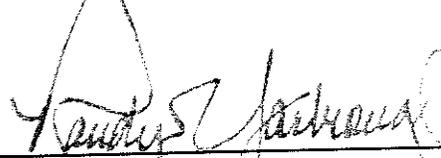
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §311, of the Commission Rules, that unless the Respondent pays a civil penalty in the amount of **\$750.00** on or before the **5th** day of **June, 2000**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the **12th** day of **June, 2000**.

This Order will become final and enforceable on April 25, 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 3rd day of April, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Ruth Casarez
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (210) 308-6854

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

Jose Alfredo Martinez
d/b/a Joe's Food Mart
RESPONDENT
1752 W. Poplar
San Antonio, Texas 78207
CERTIFIED MAIL/RRR NO. Z 473 037 927

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
San Antonio District Office



INTER-OFFICE COMMUNICATION
TEXAS ALCOHOLIC BEVERAGE COMMISSION

March 28, 2000

TO: Gayle Gordon, Director of Legal

FROM: Randy Yarbrough, Assistant Administrator

SUBJECT: Docket No. 458-99-1552 TABC Case No. 582785
Docket No. 458-99-1543 TABC Case No. 583447
Docket No. 458-99-1562 TABC Case No. 583119
Docket No. 458-99-1551 TABC Case No. 583498
Docket No. 458-99-1549 TABC Case No. 584416

I have read the attached record of the above referenced case and find the following:

Based on the record, I concur with the finding of the Administrative Law Judge that the licenses at the above referenced locations should be **SUSPENDED**. Please prepare an **ORDER** adopting the Proposals for Decision, suspending the Licenses as follows:

Docket 582785	10 days or a fine in the amount of \$1,500 in lieu of the suspension.
Docket 582447	10 days or a fine in the amount of \$1,500 in lieu of the suspension.
Docket 583119	14 days or a fine in the amount of \$2,100 in lieu of the suspension.
Docket 583498	5 days or a fine in the amount of \$ 750 in lieu of the suspension.
Docket 584416	7 days or a fine in the amount of \$1,050 in lieu of the suspension.

Please make a copy of this decision and submit it along with the order to the respective parties.

Handwritten signature of Randy Yarbrough, written in cursive and underlined.

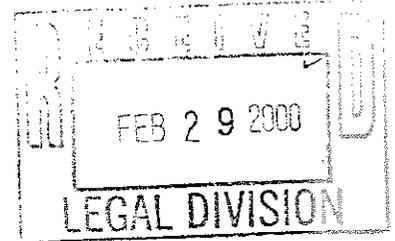
RY

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 29, 2000



Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-99-1551; TABC vs. JOSE ALFREDO MARTINEZ, D/B/A JOE'S FOOD MART, PERMIT NO. BF-420964, BEXAR COUNTY, TEXAS

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Jose Alfredo Martinez (Permittee). For reasons discussed in the Proposal for Decision, the Staff recommended that Permittee's permit be suspended for five days or pay a fine of \$750.00 in lieu of suspension. I agree with the Staff's recommendation.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

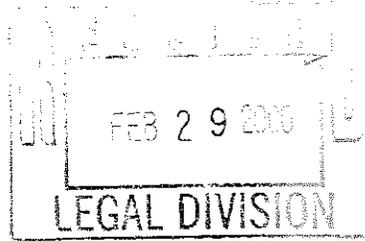
Sincerely,

A handwritten signature in cursive script that reads "Ruth Casarez".

Ruth Casarez
Administrative Law Judge

RC/vg
Enclosure

xc: Gayle Gordon, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Jose Alfredo Martinez d/b/a Joe's Food Mart, 1752 W. Poplar, San Antonio, TX 78207 - **VIA CERTIFIED MAIL NO. Z 312 322 791, RETURN RECEIPT REQUESTED**
Rommel Corro, Docket Clerk, State Office of Administrative Hearings - **VIA HAND DELIVERY**



DOCKET NO. 458-99-1551

TEXAS ALCOHOLIC
BEVERAGE COMMISSION

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BEFORE THE STATE OFFICE

v.

JOSE ALFREDO MARTINEZ
D/B/A JOE'S FOOD MART
PERMIT NO. BF-420964
BEXAR COUNTY, TEXAS
(TABC CASE NO. 583498)

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Jose Alfredo Martinez d/b/a Joe's Food Mart (the Permittee) for paying for beer with a check for which funds were insufficient. The Permittee did not appear at the hearing. The Staff recommended that Permittee's permit be suspended for five days or pay a fine of \$750.00 in lieu of suspension. The Administrative Law Judge (ALJ) agrees with the Staff's recommendation.

I. Procedural History, Notice, and Jurisdiction

The hearing in this matter convened on October 18, 1999, before ALJ James Kuvet, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by Gayle Gordon, Assistant Attorney General. The Permittee did not appear and was not represented at the hearing; therefore, the hearing proceeded on a default basis, pursuant to 1 TEX. ADMIN. CODE § 155.55. Because the hearing proceeded on a default basis, the Staff's factual allegations are deemed admitted as true, and the undersigned ALJ who reviewed the evidence that was received and prepared the proposal for decision (PFD) has incorporated those allegations into the Findings of Fact without further discussion.

The Texas Alcoholic Beverage Commission (the Commission) and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the Conclusions of Law. The notice of intention to institute enforcement action and the notice of the hearing met the notice requirements imposed by statute and by rule as set forth in the Findings of Fact and Conclusions of Law.

II. The Allegations and Applicable Statutory Provisions

There were two allegations in this proceeding, asserting the Permittee, its agent, or employee paid beer distributors for beer with checks that were subsequently returned for insufficient funds. It is a violation of TEX. ALCO. BEV. CODE ANN. (the 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 or a maximum 60-day suspension of a permit.

III. Checks for Insufficient Funds

As described in the Findings of Fact, the Permittee violated the Code § 61.73(b) by writing checks for beer that were subsequently returned for insufficient funds. The Permittee, its agent, servant, or employee wrote the checks. Pursuant to the Code § 1.04(11), the Permittee is responsible for its own acts and the acts of its agents.

IV. Recommendation

Penalties for the violations of the Code § 61.73(b) may be determined in accordance with the Commission's standard penalty chart found at 16 TEX. ADMIN. CODE § 37.60. The penalty chart prescribes suspensions of varying lengths, depending on a permittee's history of violations.

In this case, Staff recommended a five-day suspension; the ALJ agrees with the recommendation. Pursuant to the Code § 11.64, the Permittee must be offered the opportunity to pay a civil penalty in lieu of a suspension. The penalty may not be less than \$150.00 nor more than \$25,000.00 for each day of the suspension. Staff recommended the minimum amount be used to determine the civil penalty. The ALJ agrees with Staff's recommendation.

V. Findings of Fact

1. Jose Alfredo Martinez d/b/a Joe's Food Mart (the Permittee), located at 1752 W. Poplar, San Antonio, Bexar County, Texas 78207, holds Permit No. BF-420964.
2. Staff of the Texas Alcoholic Beverage Commission (Staff) sent a notice of hearing, dated August 31, 1999, to Permittee at the address provided in Finding of Fact No. 1. The notice was returned "attempted-not known" on September 13, 1999.
3. Staff sent a second notice of hearing to Permittee on September 16, 1999. The notice was properly sent to Permittee at the address provided in Finding of Fact No. 1 and was returned "undeliverable" on September 22, 1999.
4. Both notices of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing

was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

5. The second notice of hearing also contained the following language in 10-point or larger boldface type: If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default.
6. The hearing was convened on October 18, 1999, at 9:00 a.m. at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Permittee did not appear and was not represented at the hearing. Gayle Gordon, Assistant Attorney General, represented the Staff.
7. On or about February 9, 1999, Permittee, its agent, servant, or employee gave a check written in the amount of \$342.05 to BudCo., Ltd., of San Antonio, Texas. On or about February 19, 1999, the check was returned by Drawee, Bank of America, of San Antonio, Texas for insufficient funds.
8. On or about February 11, 1999, Permittee, its agent, servant, or employee gave a check for \$326.35 to Halo Distributing Company of San Antonio, Texas. On or about February 25, 1999, the check was returned by Drawee, Bank of America, of San Antonio, Texas for insufficient funds.

VI. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61, and 61.73 (Vernon 1995 & Supp. 2000).
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 (Vernon 1995 & Supp. 2000) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000).
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000), and 1 TEX. ADMIN. CODE § 155.55(d) (1999), which provides that service of notice of hearing shall be complete and effective if the document to be served is sent by registered or certified mail to the defaulting party's most recent address as shown in the records of the referring agency.
4. The Permittee, its agent, servant, or employee gave checks in payment for beer, which were dishonored for insufficient funds when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. § 61.73(b) (Vernon 1995).

5. Based on the foregoing Findings and Conclusions, a five-day suspension of the permit is warranted pursuant to 16 TEX. ADMIN. CODE § 37.60 (1999).
6. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64 (Vernon 1995 & Supp. 2000), the Permittee should be allowed to pay a \$750.00 civil penalty in lieu of suspension of its permit.

SIGNED this 29th day of February 2000.



RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS