

DOCKET NO. 584643

IN RE ACT ASSOCIATES, INC.	§	BEFORE THE
D/B/A JACK'S PUB & VOLLEYBALL CLUB	§	
PERMIT NOS. MB258663, LB258664,	§	TEXAS ALCOHOLIC
CB269063	§	
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-2625)	§	BEVERAGE COMMISSION

ORDER

**CAME ON FOR CONSIDERATION** this 2nd day of May 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Jerry Van Hamme. The hearing convened on January 18, 2000 and adjourned January 26, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 24, 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.

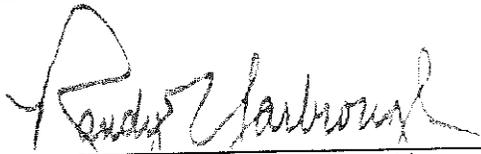
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Permit Nos. MB258663, LB258664 and CB269063 are herein **SUSPENDED for thirty (30) days beginning on July 5, 2000 unless a civil penalty in the amount of \$4,500.00 is paid on June 28, 2000.**

**This Order will become final and enforceable on May 24, 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 2nd day of May, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Jerry Van Hamme  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE (214) 956-8611**

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

Act Associates, Inc.  
d/b/a Jack's Pub & Volleyball Club  
**RESPONDENT**  
2546 Elm, Ste. 211  
Dallas, TX 75226  
**CERTIFIED MAIL/RRR NO. Z 473 040 085**

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

Licensing Division  
Dallas District Office

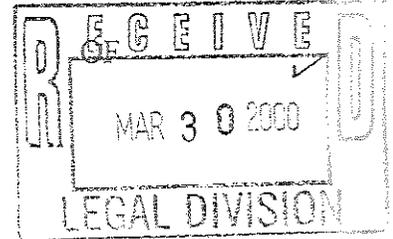
TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

BEFORE THE STATE OFFICE

V.

ACT ASSOCIATES, INC.  
D/B/A JACK'S PUB & VOLLEYBALL CLUB  
MB-258663, LB-258664 & CB-269063;  
DALLAS COUNTY, TEXAS  
(TABC CASE NO. 584643)

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ADMINISTRATIVE HEARING

**. PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (Staff) brought this disciplinary action against Act Associates, Inc. d/b/a Jack's Pub and Volleyball Club (Respondent), alleging that on three occasions, Respondent, its agents, servants, or employees presented checks in payment for beer which were returned by the drawee bank for non-sufficient funds, in violation of the Texas Alcoholic Beverage Code (Code), and that Respondent, its agents, servants, or employees stored alcoholic beverages in a location other than the premises for which it had a permit in violation of the Code. Staff requested that Respondent's permits be suspended for 30 days or that Respondent pay a civil penalty of \$4,500. This proposal finds that Respondent, its agents, servants, or employees presented checks in payment for beer which were returned by the drawee bank for non-sufficient funds on three different occasions, and that Respondent, its agents, servants, or employees stored alcoholic beverages in a location for which it did not have a permit. The Administrative Law Judge (ALJ) recommends that Respondent's permits be suspended for 30 days or that Respondent pay a civil penalty of \$4,500.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

No contested issues of notice, jurisdiction, or venue were raised in this proceeding. Therefore, these matters are set out in the findings of fact and conclusions of law without further discussion here.

On January 18, 2000, a hearing was convened before Jerry Van Hamme, Administrative Law Judge (ALJ), State Office of Administrative Hearings, at 6300 Forest Park Road, Suite B-230, Dallas, Dallas County, Texas. Staff was represented by its attorney, Timothy Griffith. Respondent was represented by Mark Kelcher, President of Respondent, and Dirk Kelcher. Evidence was received from both parties on that date. The record was closed on January 26, 2000, after the parties were allowed to submit additional written materials.

## II. LEGAL STANDARDS AND APPLICABLE LAW

Respondent holds three permits: a Mixed Beverage Permit, a Mixed Beverage Late Hours Permit, and a Caterer's Permit.

### 1. Paying for beer with a check dishonored when presented for payment

Both a Mixed Beverage Permit<sup>1</sup> and a Mixed Beverage Late Hours Permit<sup>2</sup> are subject to suspension if the permittee pays for beer with a check that is dishonored when presented for payment. A Caterer's Permit, which is auxiliary to a Mixed Beverage Permit, becomes invalid if the Mixed Beverage Permit is suspended.<sup>3</sup>

### 2. Possessing mixed beverages at a location for which a permit has not been granted

A Mixed Beverage Permit<sup>4</sup> and a Mixed Beverage Late Hours Permit<sup>5</sup> are also subject to

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<sup>1</sup>TEX. ALCO. BEV. CODE ANN., Sec. 28.12. SALE OF MALT BEVERAGES TO PERMITTEE. The sale of malt beverages to a mixed beverage permittee by a local distributor's permittee or by a licensee authorized to sell them for resale is subject to the provisions of Section 61.73 of this code.

**TEX. ALCO. BEV. CODE ANN., Sec. 61.73. RETAIL DEALER: CREDIT PURCHASE OR DISHONORED CHECK.**

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it found, after notice and hearing, that the licensee gave a check, as maker or endorser, or a draft, as drawer or endorser, as full or partial payment for beer or the containers or packages in which it is contained or packaged, which is dishonored when presented for payment.

<sup>2</sup>TEX. ALCO. BEV. CODE ANN., Sec. 29.03. APPLICATION OF PROVISIONS REGULATING MIXED BEVERAGE PERMITS. All provisions of this code which apply to a mixed beverage permit also apply to a mixed beverage late hours permit.

<sup>3</sup>Sec. 31.04. APPLICATION OF PROVISIONS REGULATING MIXED BEVERAGE PERMITS.  
(a) A caterer's permit is auxiliary to the primary mixed beverage permit held by the permittee.

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(e) If the primary permit ceases to be valid for any reason, the caterer's permit ceases to be valid.

<sup>4</sup>Sec. 11.06. PRIVILEGES LIMITED TO LICENSED PREMISES. No person may use a permit or exercise any privileges granted by the permit except at the place, address, premises, or location for which the permit is issued, except as otherwise provided by this code.

**Sec. 11.61. CANCELLATION OR SUSPENSION OF PERMIT.**

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(2) the permittee violated a provision of this code or a rule of the commission;

<sup>5</sup>TEX. ALCO. BEV. CODE ANN., Secs. 11.06, 11.61, & 29.03. *Supra*

suspension if the permittee possesses mixed beverages at a location other than the permitted premises.<sup>6</sup> So, too, is a Caterer's Permit.<sup>7</sup> The holder of a caterer's permit may temporarily be certified to possess mixed beverages at a location other than the premises for which the permit was originally authorized,<sup>8</sup> but upon expiration of that certification the beverages must, once again, be possessed only at the location for which the permit was issued.

### 3. Burden of proof

Staff bears the burden of proof, by a preponderance of the evidence, to show the alleged violations occurred.

## III. EVIDENCE AND PARTIES' CONTENTIONS

### A. Staff's Evidence

#### 1. Paying for beer with a check dishonored when presented for payment

Staff presented an affidavit from the Office Manager of Ben E. Keith Co. of Dallas, Texas, stating that a check dated May 3, 1999, in the amount of \$500.06 was received from Respondent in payment for beer and the containers and original packages in which the beer was contained, and that the check was dishonored on May 4, 1999, by the drawee bank for non-sufficient funds.

Staff presented an affidavit from Big Jim Liquor of Dallas, Texas, stating that a check dated

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#### <sup>6</sup>Sec. 28.01. AUTHORIZED ACTIVITIES.

(a) The holder of a mixed beverage permit may sell, offer for sale, and possess mixed beverages, including distilled spirits, for consumption *on the licensed premises*:

- (1) from sealed containers containing...; and
- (2) from unsealed containers.

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(c) The holder of a mixed beverage permit may also:

- (1) purchase wine, beer, ale, and malt liquor containing alcohol of not more than 21 percent by volume in containers of any legal size from any permittee or licensee authorized to sell those beverages for resale; and
- (2) sell the wine, beer, ale, and malt liquor for consumption *on the licensed premises*.

(Emphasis added)

#### <sup>7</sup>Sec. 31.04. APPLICATION OF PROVISIONS REGULATING MIXED BEVERAGE PERMITS.

(b) The restrictions and regulations which apply to the sale of mixed beverages on the licensed premises also apply to the sale under the authority of a caterer's permit, and any act that is prohibited on the licensed premises is also prohibited when the permittee is operating other than on the licensed premises under a caterer's permit.

(c) Any act which if done on the licensed premises would be a ground for cancellation or suspension of the mixed beverage permit is a ground for cancellation of both the mixed beverage permit and the caterer's permit if done when the permittee is operating away from the licensed premises under the authority of the caterer's permit.

<sup>8</sup>Sec. 31.01. AUTHORIZED ACTIVITIES. The holder of a caterer's permit may sell mixed beverages on a temporary basis at a place other than the premises for which the holder's mixed beverage permit is issued....

October 15, 1999, in the amount of \$853.98 was received from Respondent in payment for beer and the containers and original packages in which the beer was contained, and that the check was dishonored on October 20, 1999, by the drawee bank for non-sufficient funds.

Staff presented an affidavit from the vice-president of Miller Distributing of Fort Worth Inc. of Fort Worth, Texas, stating that a check dated October 28, 1999, in the amount of \$2,199.75 was received from Respondent in payment for beer and the containers and original packages in which the beer was contained, and that the check was dishonored on November 4, 1999, by the drawee bank for non-sufficient funds.

**2. Possessing mixed beverages at a location for which a permit has not been granted**

Respondent's licensed premises is 5550 Yale, Dallas, Texas. Respondent was granted a Caterer's certificate for an off-premise location, 2816 Elm, Dallas, Texas, for two days only, March 26 and 27, 1999.

On April 4, 1999, Staff agents Cavazos and Bennett observed a large crowd at the 2816 Elm location drinking alcoholic beverages. Upon investigation, the agents determined that Respondent's alcohol, delivered to that location the previous weekend pursuant to Respondent's caterer's certificate for March 26 and 27, was still there, and that the alcohol was being sold without a permit. The agents seized the alcohol.<sup>9</sup>

**B. Respondent's Evidence**

**1. Paying for beer with a check dishonored when presented for payment**

Dirk Kelcher testified that the checks dishonored for non-sufficient funds were due either to simple miscalculations as to the amount of money in Respondent's checking account or, in one instance, to the recipient of the check agreeing not to cash the check until a later date and then cashing it early.

**2. Possessing mixed beverages at a location for which a permit has not been granted**

Mark Kelcher testified that Respondent's alcohol was still located at the 2816 Elm location on April 4, 1999, even though Respondent's Caterer's certificate for that location had expired on March 27, 1999, because the alcohol was inaccessible. The 2816 Elm location was locked between March 27 and April 4 and the individual with the key could not be found. Despite repeated attempts to retrieve the alcohol during the week, Respondent's alcohol was still present at that location on April 4 when the individual with the key returned and began selling Respondent's alcohol without Respondent's permission or knowledge.

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<sup>9</sup>A list of the alcohol seized on that date is attached as Appendix A.

#### IV. ANALYSIS

The parties are in agreement that Respondent paid for beer on three separate occasions with checks that were dishonored when presented for payment. Although the violations may have been due to honest mistakes or simple computational errors, Respondent is responsible, under the Code, to prevent these mistakes from occurring.

By the same token, the parties are also in agreement that between March 27 and April 4, 1999, Respondent's alcohol was located on a premise for which Respondent had no permit. On the weekend of March 26 and 27, 1999, Respondent was temporarily certified to possess alcohol at 2816 Elm in Dallas. However, upon the expiration of that certification, the only location for which Respondent had a permit to possess alcohol was its original premises at 5550 Yale in Dallas. During the week that Respondent's alcohol remained at the 2816 Elm location between March 27 and April 4, 1999, therefore, Respondent possessed alcohol at a location for which it did not have a permit. Even though Respondent may not have been aware that this violated the Code, Respondent is nonetheless liable for discipline under the Code. Texas Alcoholic Beverage Com'n v. Top of the Strip, Inc., (Tex.App.--San Antonio 1999).

#### V. RECOMMENDATION

Accordingly, the ALJ agrees with Staff and recommends that Respondent's permits be suspended for 30 days or that Respondent pay a civil penalty of \$4,500 in lieu of this suspension.<sup>10</sup>

#### FINDINGS OF FACT

1. All parties received notice of the hearing, all parties appeared at the hearing, and no objection was made to jurisdiction, venue, or notice.
2. Respondent, Act Associates d/b/a Jack's Pub & Volleyball Club, holds Mixed Beverage Permit No. MB-258663; Mixed Beverage Late Hours Permit No. LB-258664; and Caterer's Permit No. CB-269063.
3. Respondent's premises for which the permits were issued is located at 5550 Yale, Dallas, Dallas County, Texas.
4. On May 3, 1999, Respondent presented a check to Ben E. Keith Co. of Dallas, Texas, in the amount of \$500.06 in payment for beer, and the containers and original packages in which the beer was contained. The check was dishonored on May 4, 1999, by the drawee bank for non-sufficient funds.

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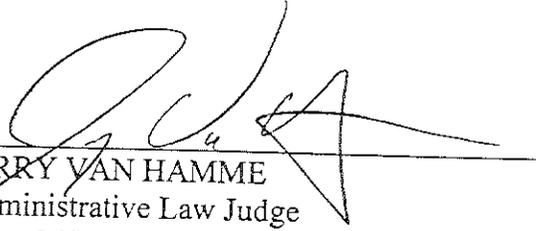
<sup>10</sup>TEX. ALCO. BEV. CODE ANN., Sec. 11.64. ALTERNATIVES TO SUSPENSION, CANCELLATION. (a) ... In cases in which a civil penalty is assessed, the commission or administrator shall determine the amount of the penalty and in doing so shall consider the economic impact a suspension would have on the permittee or licensee. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended.

5. On October 15, 1999, Respondent presented a check to Big Jim Liquor of Dallas, Texas, in the amount of \$853.98 in payment for beer, and the containers and original packages in which the beer was contained. The check was dishonored on October 20, 1999, by the drawee bank for non-sufficient funds.
6. On October 28, 1999, Respondent presented a check to Miller Distributing of Fort Worth Inc. of Fort Worth, Texas, in the amount of \$2199.75 in payment for beer, and the containers and original packages in which the beer was contained. The check was dishonored on November 4, 1999, by the drawee bank for non-sufficient funds.
7. Respondent was granted a Caterer's certificate for 2816 Elm, Dallas, Texas, for the dates of March 26 and 27, 1999.
8. From March 28 to April 4, 1999, Respondent's alcoholic beverages were located at 2816 Elm, Dallas, Texas. Respondent did not have a permit to possess alcohol at this location on these dates.

#### CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. Ch. 5, §§6.01, and 11.61. The State Office of Administrative Hearings has jurisdiction over all matters related 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.
2. Respondent received adequate notice of the proceedings and hearing.
3. Based on Findings of Fact Nos. 4-6, Respondent, on three separate occasions, gave a check, as maker or endorser, as full or partial payment for beer or the containers or packages in which it is contained or packaged, which was dishonored when presented for payment, contrary to TEX. ALCO. BEV. CODE ANN. §§11.61(b)(2), 28.12 and 61.73(b).
4. Based on Findings of Fact Nos. 7 & 8, Respondent possessed alcoholic beverages at a location for which it did not have a permit, contrary to TEX. ALCO. BEV. CODE ANN §§11.06, 11.61(b)(2), 28.01, 29.03 & 31.04.
5. Based on Conclusions of Law Nos. 3 & 4, Respondent's Mixed Beverage Permit No. MB-258663; Mixed Beverage Late Hours Permit No. LB-258664; and Caterer's Permit No. CB-269063 should be suspended for 30 days or Respondent should pay a civil penalty of \$4,500.

SIGNED this 24 day of March, 2000.



JERRY VAN HAMME  
Administrative Law Judge  
State Office of Administrative Hearings