

**DOCKET NO. 591864**

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION	§	
	§	
VS.	§	
	§	ALCOHOLIC
TUFAIL MOHAMMAD MALIK	§	
D/B/A TWIN CEDAR DRIVE IN	§	
PERMIT NO. BQ-404963	§	
GONZALES COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-01-2409)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 15th day of August, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Bill Zukauckas. The hearing convened on May 1, 2001, and the record was closed on May 9, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 10, 2001. 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.

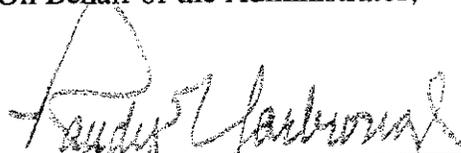
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations are hereby **DISMISSED with prejudice**.

This Order will become final and enforceable on September 5, 2001, 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 15th day of August, 2001.

On Behalf of the Administrator,



---

Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Bill Zukauckas  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FACSIMILE: (512) 475-4994**

Tufah Mohammad Malki  
**RESPONDENT**  
d/b/a Twin Cedar Drive In  
805 Saint Andrew Street  
Gonzalez, Texas 78629  
**VIA REGULAR MAIL**

Licensing Division  
Austin District Office

**DOCKET NO. 458-01-2409**

<b>TEXAS ALCOHOLIC BEVERAGE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>COMMISSION,</b>	§	
<b>PETITIONER,</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>TUFAIL MOHAMMAD MALIK</b>	§	
<b>D/B/A TWIN CEDAR DRIVE IN</b>	§	
<b>PERMIT NO. BQ-404963</b>	§	
<b>(TABC CASE NO. 591864),</b>	§	
<b>RESPONDENT.</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

The staff of the Texas Alcoholic Beverage Commission (Staff or TABC) brought this enforcement action against respondent Tufail Mohammad Malik d/b/a Twin Cedar Drive In (Mr. Malik). Staff alleged that Mr. Malik sold or served alcoholic beverages to an obviously intoxicated person, who was a clear danger to himself and others, and recommended a 30-60 day suspension of Mr. Malik's alcoholic beverage permit. Mr. Malik denies the allegation.

The Administrative Law Judge finds that Staff was unable to prove, by a preponderance of the evidence, that Mr. Malik sold an alcoholic beverage to an intoxicated person and recommends no suspension of his license.

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

ALJ Bill Zukauckas convened a hearing in this case on May 1, 2001, at the State Office of Administrative Hearings, 1700 N. Congress Avenue, Austin, Texas. Staff Attorney Dewey A. Brackin represented TABC, and Mr. Malik represented himself. The hearing concluded the same day, but the ALJ held the record open until May 9, 2001, to allow a local police officer to testify by phone.

Neither party contested jurisdiction or notice, which will be addressed in the findings of fact and conclusions of law without further discussion here.

**II. THE EVENTS OF SEPTEMBER 24, 2000**

**1. Agent Mitchell**

TABC Agent Donald Mitchell was staked out on the early morning of September 24, 2000, across the street from Mr. Malik's convenience store at 805 St. Andrews St., Gonzales, Texas.

Agent Mitchell testified that he was watching for liquor law violations including sale of alcohol to minors and a sale of alcohol to intoxicated individuals.

At approximately 2:20 a.m., Agent Mitchell noticed an obviously intoxicated Hispanic male stumbling and walking towards the store entrance. Agent Mitchell testified that the intoxicated individual walked to the store from his residence, and at the time he entered the store, he had nothing in his hands. After a few minutes the intoxicated individual exited the store with what he later learned was a 16 oz. can of Budweiser beer in a brown quart-sized paper bag. Agent Mitchell stopped the intoxicated individual to ask questions about the apparent beer purchase and a scuffle ensued. After several minutes of scuffling on the ground, the intoxicated individual was handcuffed and placed under arrest for public intoxication. Agent Mitchell testified he did not view any part of the alleged sale inside the store from his vantage point outside the store. He also testified that Mr. Malik denied making an alcoholic beverage sale to this intoxicated person. Agent Mitchell testified that he failed to retain the cash register receipt from the subject sale and that he did not keep the video tape from the store as evidence, although he admits he may have walked out of the store with a video tape in hand at one point during Mr. Malik's arrest.

## **2. Tufail Mohammad Malik**

Mr. Malik testified that he agreed the Hispanic male in question that entered his store was obviously intoxicated. He stated that he was operating the register and that an employee clerk was working in the back near the refrigerated shelves holding the six-packs of beer. Mr. Malik stated that the intoxicated individual walked back to those refrigerated shelves where he was advised by a store clerk that the store could not sell him beer while he was intoxicated. Despite this warning, the intoxicated individual picked up a six-pack of 16 oz. Budweiser and took it to the register for purchase, according to Mr. Malik. At the register, Mr. Malik stated that he also advised the intoxicated individual that the store could not sell him beer. Mr. Malik then testified that the intoxicated individual left the six-pack on the counter, picked up a quart-sized brown bag near the register, and exited the store without making an alcohol purchase.

### **III. ALJ's ANALYSIS**

This seemingly simple matter presents some very unusual fact circumstances. The confusion these facts present tend to weigh against the party with the burden of proof, the TABC Staff. The ALJ recommends that Staff has not proven its case by a preponderance of the evidence.

This record is unusual because there is no video tape of the alleged sale of the beer to the intoxicated individual, but yet there is a video tape of the Respondent's arrest after the alleged sale. One might surmise that Mr. Malik might have a motive in not wanting to make easily accessible a video tape that might prove the TABC Staff's case. Even so, the events captured on the video tape of Mr. Malik's arrest, recorded by Mr. Malik, raise some unusual questions.

Agent Mitchell testified that Mr. Malik simply pulled a random video tape from a box of video tapes when Agent Mitchell asked Mr. Malik to allow him to view the subject transaction. According to Agent Mitchell, the subject transaction was not found on this video. In an unusual twist, however, Mr. Malik did record at the time, and produce at hearing, a video tape of his exchanges with Agent Mitchell prior to and during his arrest. That video shows Agent Mitchell and Mr. Malik, immediately before Mr. Malik's arrest, viewing the randomly pulled store video tape. Agent Mitchell stated that this video did not show the transaction with Mr. Malik and the intoxicated individual at the cash register. The ALJ, with the benefit of hindsight, wonders why Agent Mitchell did not make more extensive attempts to find the video that might contain evidence about the alleged transaction.

The Malik arrest video shows Agent Mitchell looking at the cash register tape and going back many inches on the tape (ten transactions or more) to find an \$.85 sale - the price of the 16 oz. can of Budweiser allegedly sold to the intoxicated individual. The ALJ has some serious doubts that the alleged transaction would have been that many transactions back. Mr. Malik testified that there were no additional customer transactions after the intoxicated individual left the store until the time of his arrest. And while that testimony alone might be self-serving, when combined with the fact that Agent Malik was outside the store fighting with the intoxicated individual during the time period when any possible transactions could have occurred, the ALJ questions whether more than ten customers could have checked out after the alleged sale to the intoxicated individual.

On May 9, 2001, the ALJ conducted a short phone hearing where Officer Edward Cusak of the Gonzales Police Department testified. Officer Cusak was produced in response to the ALJ request of Staff to produce another witness that participated in Mr. Malik's arrest in an attempt to tie up some loose ends. Officer Cusak's testimony was not helpful because he did not seem to be familiar with the video tape Agent Mitchell and Mr. Malik were seen viewing on the Malik arrest video.

The ALJ believes it is a shortcoming in the Staff's case that Agent Mitchell could not produce the cash register receipt at the hearing. The arrest video clearly shows that Agent Mitchell tore off and picked up the cash register receipt. While his credible testimony was that he forgot the register receipt, the register receipt is an important piece of evidence that would tie down the time of the transaction on the receipt. The register receipt should have been collected and might have shed some additional light on the Staff's allegation.

#### **IV. SUMMARY AND RECOMMENDED SANCTION**

In summary, the ALJ finds that the TABC Staff was unable to meet its burden of proving Mr. Malik sold an alcoholic beverage to the intoxicated individual when viewing the evidence as a whole. The ALJ finds too many important questions remain to make a finding that it was more likely than not that he sold an alcoholic beverage to this intoxicated person.

Because the evidence did not establish that Mr. Malik violated TEX. ALCO. BEV. CODE §11.61(b)(14), the ALJ does not recommend that the Texas Alcoholic Beverage Commission sanction Mr. Malik.

## V. FINDINGS OF FACT

1. Staff of the Texas Alcoholic Beverage Commission (TABC or Commission) provided notice of hearing to Respondent Tufail Mohammad Malik d/b/a Twin Cedars Drive In (Mr. Malik) on April 2, 2001.
2. A hearing on the merits convened in this case on May 1, 2001, at the State Office of Administrative Hearings, 1700 N. Congress Avenue, Austin, Texas. All parties appeared and participated in the hearing. The hearing concluded the same day, but the ALJ held the record open until May 9, 2001, to allow an additional witness to testify by phone.
3. Mr. Malik's store is located in Gonzales, Gonzales County, Texas, and holds TABC permit No. BG-404163.
4. On September 24, 2000, at about 2:20 a.m., an intoxicated male entered Mr. Malik's store.
5. TABC Agent Donald Mitchell was staked out across the street from the store watching for alcoholic beverage code violations at the store.
6. Agent Mitchell observed the intoxicated individual enter the store with nothing in his hands and then later exit the store carrying a 16 oz. can of Budweiser beer inside a brown paper bag.
7. The TABC Staff was unable to show, by a preponderance of evidence, that Mr. Malik sold an alcoholic beverage to the intoxicated individual.
  - a. No cash register receipt of the alleged sale was produced at hearing, although video evidence at hearing indicated Agent Mitchell collected one.
  - b. The cash register receipt originally torn off seemed to be too far back, transaction wise, from the time of the alleged sale. Store traffic was light at or near the time of the alleged sale and Agent Mitchell was outside the store for part of this time period fighting with the intoxicated individual.
  - c. TABC Staff did not make a complete effort to determine whether or not a video tape of the alleged transaction took place.

## VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.35, 6.01, and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of the 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.
3. Staff provided notice of hearing in accordance with the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. The hearing in this proceeding was conducted according to the requirements of the Administrative Procedure Act, the rules of the State Office of Administrative Hearings 1 TEX. ADMIN. CODE, § 155, and the Commission's rules on contested cases 16 TEX. ADMIN. CODE, § 37.
5. Based on Finding of Fact No. 7, Mr. Malik was not shown to have violated TEX. ALCO. BEV. CODE § 11.61(b)(14) on September 24, 2000.
6. Based on Conclusion of Law No. 5, Mr. Malik's Wine and Beer Retailer's Off-Premise permit should not be suspended.

Signed July 10, 2001.

STATE OFFICE OF ADMINISTRATIVE HEARINGS



---

**BILL ZURAUCKAS**  
**ADMINISTRATIVE LAW JUDGE**