

DOCKET NO. 524383

IN RE 2025 GREENVILLE AVENUE INC.	§	BEFORE THE TEXAS
d/b/a Zephyrs	§	
PERMIT NO. MB-555774	§	
	§	
	§	ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-2609)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 10th day of January, 2007, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing was convened July 14, 2006 and closed on the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 12, 2006. The 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. No exceptions or responses were filed by either party.

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.

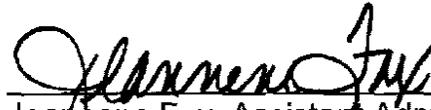
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits shall be suspended for a period of 3 days commencing at 12:01 a.m. on March 7, 2007, unless a civil penalty in the amount of \$450.00 is paid by the Respondent to the Commission on or before 12:01 a.m. on March 14, 2007.**

This Order will become final and enforceable on March 5, 2007, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties as indicated below.

SIGNED on this 18th day of January, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JF/dn

The Honorable Brenda Coleman
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
VIA FACSIMILE: 214-956-8611

GREENVILLE AVENUE INC.
RESPONDENT
d/b/a Zephyrs
5628 Sears St.
Dallas, TX 75206
CMRRR NO. 7003 2260 0000 6465 8711

Jerry McClain
ATTORNEY FOR PETITIONER
VIA FACSIMILE 214-678-4050

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-06-2609

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
2025 GREENVILLE AVENUE INC.	§	
D/B/A ZEPHYRS,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff (Petitioner) brought this disciplinary action against 2025 Greenville Avenue Inc. d/b/a Zephyrs (Respondent), alleging that Respondent or its agent, servant, or employee issued a check for purchase of beer which was dishonored when presented for payment, in violation of the Texas Alcoholic Beverage Code (the Code). Petitioner requested that Respondent's permit be suspended for four days, or in lieu of suspension, that Respondent pay a civil penalty in the amount of \$600.00. The Administrative Law Judge (ALJ) recommends that Respondent's permit be suspended for three days and that Respondent be allowed to pay a civil penalty in the amount of \$450 in lieu of suspension.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

No party challenged notice or jurisdiction. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

On July 14, 2006, a hearing convened before ALJ Brenda Coleman, State Office of Administrative Hearings (SOAH). Staff was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent's president and owner, John Rockenbach, appeared *pro se*. Evidence was presented and the record closed that same day.

II. DISCUSSION

A. Petitioner's Evidence

TABC is authorized to suspend a permit for not more than 60 days for any violation of the Code.¹ A permittee violates the Code if it gives a check as payment for beer and the check is dishonored when presented for payment.² Petitioner alleges that on October 5, 2005, Respondent or its agent, servant, or employee gave a check or draft for the purchase of beer to Ben E. Keith Co. in the sum of \$558.40, which was dishonored when presented for payment. An affidavit signed by the manager of Ben E. Keith Co., along with a copy of the dishonored check, was admitted into evidence.³ Petitioner argues that a change in ownership of the permits is not relevant because the violation follows the permit when the permit remains the same.

B. Respondent's Evidence

Respondent's president and owner, John Rockenbach, testified on behalf of Respondent. He agreed that Respondent gave a check for purchase of beer which was dishonored when presented for payment. However, he claimed that on October 5, 2006, the \$558.40 check to Ben E. Keith Co. was written by his former general manager, Scott Powell, who did not have authority to write the check. Mr. Rockenbach stated that he was not aware that Mr. Powell had written the check; therefore, the check bounced. According to Mr. Rockenbach, had he known about the check, there would have been sufficient funds in the account.

Mr. Rockenbach stated that he purchased 2025 Greenville Avenue Inc. approximately two

1 TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2) (the Code).

2 Code §§ 61.73(b) and 102.31.

3 Petitioner's Exhibit Four.

years ago from the previous owner. He acknowledged that at the time of purchase, he was unaware that TABC had issued a warning to the previous owner for a prior cash law violation. Mr. Rockenbach argued that because this is the first cash law violation under his ownership of the permits, he should receive a warning for the violation rather than a suspension or administrative penalty.

III. ANALYSIS

It is uncontested that the check in question for the purchase of beer was dishonored. According to Mr. Rockenbach, the check was written by his former manager. The permittee is responsible for its own acts and the acts of its agent or employee.⁴ The Code provides for a suspension for up to 60 days or cancellation of the permit.⁵ The standard penalty chart recommends a warning or up to a three-day suspension for a first violation, a three-day suspension for a second violation, and a five-to-ten day suspension for a third violation.⁶

A cash law violation is a major regulatory violation of the Code. Based on the fact that this is Respondent's second cash law violation, Respondent's request for a second warning is not reasonable or within the authority of the standard penalty chart. There was no evidence as to whether the dishonored check had been redeemed. The ALJ would recommend a three-day suspension. This is within the guidelines of TABC's standard penalty chart. The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit was to have been suspended.⁷ The ALJ would also recommend that Respondent be permitted to pay a civil penalty in the amount of

⁴ § 1.04(11) of the Code defines "permittee" as a person who is the holder of a permit, or an agent, servant, or employee of that person.

⁵ § 61.73(b) of the Code.

⁶ 16 TEX. ADMIN. CODE (TAC) § 37.60.

⁷ § 11.64(a) of the Code.

\$450.00 in lieu of suspension.

IV. FINDINGS OF FACT

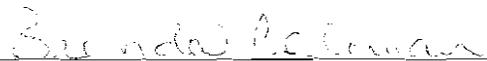
1. Respondent, 2025 Greenville Avenue Inc. d/b/a Zephyrs, holds Mixed Beverage Permit MB-555774, and Mixed Beverage Late Hours Permit LB-555775 issued by the Texas Alcoholic Beverage Commission (TABC or Petitioner) for the premises located at 5628-30 Sears Street, Dallas, Dallas County, Texas.
2. On June 23, 2006, Petitioner issued its notice of hearing to Respondent. This notice of hearing was received by Respondent on June 28, 2006.
3. The notice 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.
4. A hearing was convened before Brenda Coleman, Administrative Law Judge with the State Office of Administrative Hearings, on July 14, 2006. Petitioner appeared and was represented by Timothy Griffith, TABC Staff Attorney. Respondent's president and owner, John Rockenbach, appeared *pro se*.
5. On or about October 5, 2005, Respondent, through its agent, Scott Powell, gave Ben E. Keith Co. a check as payment for beer, and the check was dishonored when presented for payment.

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61(b)(2), 61.73(b), and 102.31.
2. SOAH has jurisdiction over all matters relating to conducting a 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. Petitioner issued its notice of hearing in compliance with 1 TEX. ADMIN. CODE §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN. § 11.63.
4. Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 61.73(b) and 102.31.

5. Based upon the above Conclusions of Law, Respondent's permits should be suspended for a period of three days.
6. Based upon the above Conclusions of Law and T EX. ALCO. BEV. CODE ANN. § 11.64. Respondent should be permitted to pay a civil penalty of \$450 in lieu of suspension of the permits.

SIGNED September 12, 2006.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

State Office of Administrative Hearings

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Shelia Bailey Taylor
Chief Administrative Law Judge

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September 12, 2006

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731

Re: Docket # 458-06-2609 TABC Vs. 2025 Greenville Avenue Inc.,
D/B/A Zephyrs Docket No. 524383

Dear Ms. Fox,

Please find enclosed a PROPOSAL FOR DECISION in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Handwritten signature of Brenda Coleman in cursive.

Brenda Coleman
Administrative Law Judge

BC/sr

cc: Timothy Griffith, Agency Council for Texas Alcoholic Beverage Commission, Via Fax;
2025 Greenville Ave., Inc., D/B/A Zephyrs, Respondent; Via Regular Mail