

DOCKET NO. 529739

IN RE TWENTY-FIRST AMENDMENT INC	§	BEFORE THE TEXAS
d/b/a Green Elephant	§	
PERMIT NOS. MB-517119 & LB	§	
	§	
	§	ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-2611)	§	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 Jerry Van Hamme. The hearing was convened July 25, 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 19, 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.

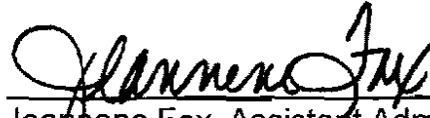
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that **Respondent's permits shall be suspended for a period of 3 days commencing at 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 Jerry Van Hamme
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
VIA FACSIMILE: 214-956-8611

TWENTY-FIRST AMENDMENT INC.
RESPONDENT
d/b/a Green Elephant
5627 Dyer St.
Dallas, TX 75206-5004
CMRRR MAIL NO. 7003 2260 0000 6465 8728

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

Licensing Division

Dallas District Office

SOAH DOCKET NO. 458-06-2611

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

V.

TWENTY-FIRST AMENDMENT INC.
D/B/A GREEN ELEPHANT,
Respondent

TABC CASE NO. 529739

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission staff (Staff) brought this enforcement action against Twenty-First Amendment Inc., d/b/a Green Elephant (Respondent) alleging Respondent paid for beer using a check that was dishonored when presented for payment in violation of the Alcoholic Beverage Code (Code). The Administrative Law Judge (ALJ) finds that Staff has proven the allegation and recommends that Respondent's permits be suspended for three days or, in the alternative, that Respondent be assessed a civil penalty of \$450.00.

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 July 25, 2006, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas. Staff was represented by Timothy Griffith, attorney for the Texas Alcoholic Beverage Commission (Commission). Shannon McKinnon, president of Respondent, appeared on behalf of Respondent.

The record was closed on the same day.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may suspend an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Texas Alcoholic Beverage Code. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).

The holder of a branch distributor's license may sell beer in the original packages to permittees authorized to sell to ultimate consumers. TEX. ALCO. BEV. CODE ANN. §§ 64.01, 66.01.

A mixed beverage permittee must use cash when purchasing beer from a licensee authorized to sell beer for resale. TEX. ALCO. BEV. CODE ANN. §§ 102.31, 1.04(15).

A valid check may be accepted as cash. TEX. ALCO. BEV. CODE ANN. § 102.31.

III. DISCUSSION

A. Petitioner's Evidence

On December 7, 2005, Respondent purchased, for resale, beer, beer containers, and original packaging from Ben E. Keith Company. Ben E. Keith Company holds a Branch Distributor's License. Respondent paid Ben E. Keith Company with a check in the amount of \$210.50. The beer, beer containers, and original packages were delivered to Respondent's address on December 7, 2005. On December 14, 2005, the check was dishonored by the drawee, Bank of Texas, for "NSF." The check was returned to Ben E. Keith Company on December 15, 2005.

B. Respondent's Evidence

Respondent presented no evidence at the hearing.

IV. ANALYSIS

A licensee, such as Ben E. Keith Company, that is authorized to sell beer for resale to a mixed beverage permittee, such as Respondent, may not make such a sale “except for cash.” TEX. ALCO. BEV. CODE ANN. §§ 1.04(15), 64.01, 66.01, 102.31. It is therefore incumbent upon Respondent as the purchaser to proffer “cash” to Ben E. Keith Company when engaging in such a sale.

A valid check is considered “cash.” TEX. ALCO. BEV. CODE ANN. § 102.31. An invalid check is not.

The check used by Respondent to pay Ben E. Keith Company was not a valid check and, therefore, was not cash as defined above. Accordingly, Respondent violated TEX. ALCO. BEV. CODE ANN. § 102.31 by engaging in a sale “except for cash.”

Based on this violation, the Commission is authorized to suspend Respondent’s permits. TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2). Staff’s request that Respondent’s permits be suspended for three days or, in the alternative, that Respondent be assessed a civil penalty of \$450.00 should, therefore, be upheld.

IV. FINDINGS OF FACT

1. Twenty-First Amendment, Inc., d/b/a Green Elephant, 5627 Dyer Street, Dallas, Dallas County, Texas, holds a Mixed Beverage Permit, MB-517119, and a Mixed Beverage Late Hours Permit, issued by the Commission on July 17, 2002.
2. Ben E. Keith Company d/b/a Ben E. Keith Beers, 1805 Record Crossing, Dallas, Dallas County, Texas, holds a Wholesaler’s Permit, W-623741, issued by the Commission on March 31, 2006, and a Branch Distributor’s License, BC-224655, issued by the Commission on May 20, 1963.
3. Respondent purchased beer, beer containers, and original packaging from Ben E. Keith Company, Dallas, Texas, for \$210.50 by check dated December 7, 2005.

4. The beer, beer containers, and original packages were delivered to Respondent's address on December 7, 2005.
5. On December 14, 2005, Respondent's check was dishonored by the drawee, Bank of Texas, for "NSF."
6. The check was returned to Ben E. Keith Company on December 15, 2005.
7. On June 23, 2006, Staff sent Respondent a Notice of Hearing by certified mail, return receipt requested, to Respondent's mailing address as listed in the Commission's records. The Notice of Hearing informed Respondent of the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referred to the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
8. On July 25, 2006, a public hearing was held before Jerry Van Hamme, ALJ, at the offices of the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas. Staff was represented by Timothy Griffith, attorney for the Commission. Shannon McKinnon, president of Respondent, appeared on behalf of Respondent. The record was closed on the same day.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(2).
2. SOAH has jurisdiction to conduct the 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.
3. Based on Finding of Fact Nos. 3 - 6, Respondent violated TEX. ALCO. BEV. CODE ANN. § 102.31.
4. Based on the foregoing findings and conclusions, the Commission is warranted in suspending Respondent's permits for three days or, in the alternative, may assess a civil penalty of \$450.00.

SIGNED September 19, 2006.


JERRY VAN HAMME
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS