

DOCKET NO. 458-98-1982

TEXAS ALCOHOLIC § BEFORE THE STATE OFFICE
BEVERAGE COMMISSION §
§
V. §
§ OF
HESAM ADIN MESBAH §
D/B/A J&L FOOD AND GAS §
BG-213683 §
BEXAR COUNTY, TEXAS §
(TABC CASE NO. 575607) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Commission) brought this enforcement action against Hesam Adin Mesbah dba J & L Food & Gas ("Mr. Mesbah" or "Permittee") for purchasing beer from a distributor with a check for which funds were insufficient. Mr. Mesbah did not dispute the allegations, but he claimed that the incident was simply the result of an oversight and that measures had been taken to minimize the possibility of a recurrence in the future. This Proposal for Decision finds the allegations to be proven, and recommends a three-day suspension of the permit or a civil penalty of \$450 in lieu of suspension.

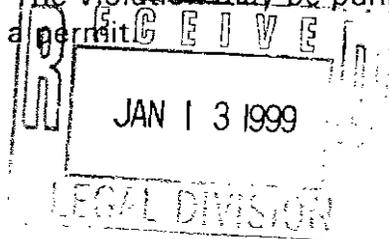
I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened on December 14, 1998, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. The staff of the Commission (Staff) was represented by its counsel, Dewey Brackin. Hesam Adin Mesbah, Permittee's proprietor, appeared *pro se*. The record closed at the conclusion of the hearing.

II. THE ALLEGATION AND APPLICABLE STATUTORY PROVISIONS

There is one allegation in this proceeding. It asserts that on one occasion, Permittee or its agent or employee paid a beer distributor for beer with a check that was 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. (Staff referred to a violation such as this as a "cash law" violation.) The violation may be punished by cancellation or a maximum 60-day suspension of a permit.



III. EVIDENCE

The evidence shows that on August 14, 1997, Permittee gave a check written on its account in the amount of \$489.85 to BudCo, Inc., a beer distributor, in payment for beer. On August 25, 1997, Permittee's bank dishonored the check due to insufficient funds to cover it.

At the hearing, Mr. Mesbah did not dispute Staff's allegation. He simply explained that in light of the "mom and pop" nature of his business, he did not have a high-tech accounting system. Consequently, an error from a simple bookkeeping mistake, which caused the overdraft on August 14, 1997, could occasionally occur. Although the check to BudCo was for nearly \$500.00, Mr. Mesbah stated, he was short on the check by only \$39.07. He added that he has now secured overdraft protection on his account, which will serve to prevent such an occurrence in the future.

IV. SANCTIONS AND RECOMMENDATION

As is the case with Permittee's overdraft, which he acknowledged, it would seem that virtually all instances of overdrafts by permittees are the result of oversight rather than design. Nevertheless, they are violations of §61.73(b) of the Code, for which penalties 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 the permittee's history of violations. An additional factor that might also be considered would be the extent to which remedial measures have been taken to safeguard against future violations.

In this case, the record reflects that Permittee had no previous cash law violations within two years preceding the current overdraft. Furthermore, the administrative law judge ("ALJ") found persuasive Mr. Mesbah's representation that he had secured overdraft protection on his account, thereby substantially reducing the potential for future overdrafts.

Staff recommended a five-day suspension of the permit. In recognition of Mr. Mesbah's violation history and remedial measure, however, the ALJ recommends the permit be suspended for three days. The recommendation reflects a good faith effort by Mr. Mesbah to ensure his future compliance with the Code's cash law provision.

Pursuant to §11.64 of the Code, Permittee must be offered the opportunity to pay a civil penalty in lieu of a suspension. The penalty may not be less than \$150 or more than \$2,500 for each day of the suspension. Therefore, Permittee should be allowed to pay a fine of \$450 (\$150 x 3 days) as an alternative to suspension.

V. FINDINGS OF FACT

1. Hesam Adin Mesbah dba J & L Food & Gas ("Mr. Mesbah" or "Permittee"), located at 901 Nogalitos, San Antonio, Texas, holds Permit No. BG-213683.
2. On October 29, 1998, the staff of the Texas Alcoholic Beverage Commission sent a notice of hearing by certified mail, return receipt requested, to Permittee regarding alleged violations of the Texas Alcoholic Beverage Code.
3. The notice was sent to Permittee's address of record.
4. The hearing on the merits was held on December 14, 1998, at the offices of the State Office of Administrative Hearings, San Antonio, Bexar County, Texas. The staff of the Commission was represented by its counsel, Dewey Brackin. Permittee appeared and represented himself at the hearing.
5. On or about August 14, 1997, Permittee, its agent, servant, or employee gave a check written in the amount of \$489.85 to a beer distributor, BudCo, Inc. of San Antonio, Texas, in payment for beer.
6. The check described in Finding 5 was returned by the drawee, Bank of America, of San Antonio, Texas, for insufficient funds.
7. Permittee was short on the check by \$39.07.
8. Permittee had no previous cash law violations within two years preceding the August 14, 1997, overdraft.
9. Following the overdraft, Permittee secured overdraft protection on his bank account.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. ("the Code") §§6.01, 61.71, and 61.73 (Vernon 1998).
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. GOV'T CODE ANN. ch. 2003 (Vernon 1998).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 1998).
4. Permittee's payment for beer with a check dishonored for insufficient funds, as reflected in Findings 5 and 6, violated §61.73(b) of the Code.

5. Based on the foregoing Findings and Conclusions, a three-day suspension of the permit is warranted. 16 TEX. ADMIN. CODE §37.60.
6. Pursuant to §11.64 of the Code, Permittee should be allowed to pay a \$450 civil penalty in lieu of suspension of its permit.

SIGNED this 13th day of January, 1999.

Kendy Ingham Humm
for _____
GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS