

DOCKET NO. 458-98-1940

TEXAS ALCOHOLIC	§	BEFORE THE STATE OFFICE
BEVERAGE COMMISSION	§	
V.	§	
ADAM ETIENNE, JR.	§	OF
D/B/A COSMO CLUB	§	
PERMIT NO. BQ-301712	§	
HARRIS COUNTY, TEXAS	§	
(TABC CASE NO. 579671)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission brought this enforcement action against Adam Etienne, Jr. d/b/a Cosmo Club (the Permittee), asserting the Permittee paid for beer with a check for which funds were insufficient. The Permittee did not attend the November 20, 1998, hearing. This Proposal for Decision finds the allegation proven and agrees with Staff's recommended sanction of a five-day permit suspension or, in lieu of suspension, payment of a \$750 penalty.

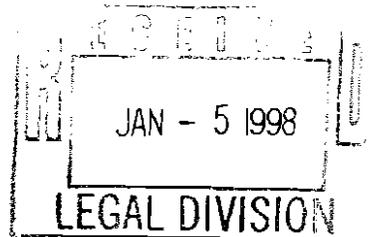
I. REASONS FOR PROPOSED DECISION

Staff alleged one instance of issuing an insufficient funds check. In the notice of hearing, Staff failed to specifically allege that the Permittee's check was written to pay for beer or its containers. However, Staff alleged the transaction violated TEX. ALCO. BEV. CODE §61.73(b) which provides:

(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 is 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.

Staff also issued a notice of violation on July 30, 1998. That letter was sent by certified mail, return receipt requested. The notice of violation includes the statement, "Permittee made payment for beer in its original containers and packages, with a dishonored check," and goes on to state the specific dates and entities involved in the insufficient funds check transaction.

The ALJ finds that by citing the specific provision in the notice of hearing and including all the elements of the violation in the notice of violation, Staff's notice met the TEX. GOV'T CODE ANN. §2001.051(a)(4) (Vernon (1998) requirement of providing "a short plain statement of the matters asserted."



The Permittee refused to accept the certified letters containing the notice of violation and the notice of hearing (Exs. 1 and 3). He also refused the Administrative Law Judge's order changing the date of the hearing from November 19, 1998, to November 20, 1998.

Because the Permittee did not appear for the hearing, Staff requested a default decision, pursuant to 1 TEX. ADMIN. CODE §155.55. The notice of hearing contained the warning required by that rule. Agreeing with Staff that such action is appropriate, the ALJ recommends the following Findings of Fact and Conclusions of Law be adopted.

II. FINDINGS OF FACT

1. Adam Etienne, Jr. d/b/a Cosmo Club (the Permittee) holds permit BQ-301712 issued by the Texas Alcoholic Beverage Commission (Commission).
2. On July 30, 1998, the Commission's Staff sent a notice of violation and on October 21, 1998, the Staff sent notice of the hearing to consider alleged violations of the TEX. ALCO. BEV. CODE ANN. (Vernon 1995 and Vernon Supp. 1998) (Code) to the Permittee at his address of record by certified mail, return receipt requested.
3. The Permittee refused to accept either notice referred to in Finding 2 and they were returned to the Commission.
4. By order dated November 9, 1998, and sent by certified mail, return receipt requested, to the Permittee's address of record, the Administrative Law Judge (ALJ) changed the date of the hearing from the originally scheduled date of November 19, 1998, to November 20, 1998.
5. The Permittee also refused to accept the ALJ's order, and it was returned to the State Office of Administrative Hearings (SOAH).
6. The hearing on the merits convened November 20, 1998, at SOAH's Houston, Texas, office (2020 North West Loop, Suite 111). The Commission's Staff was represented by its counsel, Clyde Burlison. The Permittee did not appear and was not represented at the hearing. The record closed on the same day.
7. On or about April 24, 1998, the Permittee, his agent, servant, or employee gave a check written in the amount of \$162.92 to United Beverage Company, of Houston, Texas, in payment for beer or the containers or packages in which it is contained or packaged.
8. The check described in Finding 7 was returned by the drawee, Wells Fargo Bank, for insufficient funds.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Code §§6.01, 11.61, and 61.73.
2. The State Office of Administrative Hearings 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 (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. Based upon Findings 7 and 8, the Permittee violated Code §61.73(b).
5. Based on the foregoing Findings and Conclusions, a five-day suspension of Permit BQ-413001 is warranted.
6. Pursuant to Code §11.64, the Permittee should be allowed to pay a \$750 civil penalty in lieu of suspension of his permit.

SIGNED this 5th day of January, 1999.



SARAH G. RAMOS
Senior ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS