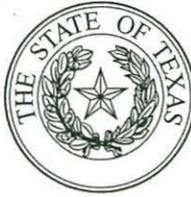


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

DEC 27 2012

RESCHOUSTON
LEGAL

December 20, 2012

Sherry Cook
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
CATRINA K. REECE d/b/a UP IN SMOKE DISCOUNT
SOAH DOCKET NO. 458-12-5298**

Dear Ms. Cook:

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 § 155.507(c), a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Jerry Van Hamme".

Jerry Van Hamme
Administrative Law Judge

JVH/sp
Enclosure

Xc: Shelia Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 427 West 20th Street, Suite 600, Houston, Texas 77008
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL, 5806 Mesa Drive, Austin Texas 78731
James Guinan, Attorney for Respondent, VIA REGULAR MAIL, 3131 Turtle Creek Blvd., Suite 901, Dallas, Texas 75219

DOCKET NO. 458-12-5298

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
 Petitioner	§	
V.	§	
CATRINA K. REECE	§	OF
D/B/A UP IN SMOKE DISCOUNT,	§	
 Respondent	§	
(TABC CASE NO. 607767)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Staff) brought this action against Katrina K. Reece d/b/a Up In Smoke, 1616 South Ewing Avenue, Dallas, Dallas County, Texas (Respondent), the holder of a Wine & Beer Retailer's Off-Premise Permit, BQ-769139. Staff alleged that Respondent's employee refused to permit, or interfered with, the inspection of Respondent's licensed premises by an authorized Texas Alcoholic Beverage Commission (Commission) representative or police officer. Staff requested that Respondent's permit be subject to a suspension or a monetary penalty. The Administrative Law Judge (ALJ) finds that Respondent's employee refused to permit, or interfered with, the inspection of the licensed premises by an authorized Commission representative or police officer and that Respondent's permit should be subject a suspension of thirteen days or a civil fine of \$3,900.00.

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 October 24, 2012, a public hearing was held before Jerry Van Hamme, ALJ, at the State Office of Administrative Hearings (SOAH), 6333 Forest Park Road, Dallas, Texas. Staff was represented by Sheila Lindsey, attorney. Respondent was represented by James Guinan and Dan Wyde, attorneys. The record was closed on that date.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission may suspend an original or renewal retail dealer's off-premise license for not more than 60 days if it is found, after notice and hearing, that the licensee violated a provision of the Alcoholic Beverage Code (Code) or a rule of the Commission during the existence of the license sought to be suspended, including refusing to permit or interfering with an inspection of the licensed premises by an authorized representative of the Commission or a peace officer. Tex. Alco. Bev. Code § 61.71 (a)(1) & (14). By accepting a license or permit, the holder consents that the Commission, an authorized representative of the Commission, or a peace officer may enter the licensed premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed by the Code. Tex. Alco. Bev. Code § 101.04.

III. EVIDENCE

A. Petitioner's Evidence

Larry Reid, an enforcement agent for the Commission, testified that on November 16, 2011, he entered Respondent's establishment, along with another Commission agent and uniformed Dallas Police Department (DPD) officers, for the purpose of conducting an inspection. Marcelino Ruiz, Respondent's employee, was working behind the counter as a sales clerk in Respondent's establishment. Mr. Reid identified himself to Mr. Ruiz as an enforcement agent for the Commission and informed Mr. Ruiz that he was conducting an inspection. Mr. Reid requested to have access to the area behind the counter where Mr. Ruiz was working for the purpose of conducting the

inspection. Mr. Reid testified that although Mr. Ruiz was aware that Mr. Reid was a Commission enforcement agent and that he was attempting to inspect the premises, Mr. Ruiz refused to allow Mr. Reid or any DPD officers access behind the counter to inspect the premises. Mr. Reid spent approximately five to ten minutes explaining to Mr. Ruiz that he was attempting to conduct an inspection, but Mr. Ruiz refused to let Mr. Reid behind the counter. Mr. Ruiz then made a telephone call to Catrina Reece, Petitioner, informing her that Mr. Reid had requested access behind the counter for the purpose of inspecting the premises, but, after the phone call, continued to refuse Mr. Reid access to conduct the inspection.

B. Respondent's Evidence

1. Marcelino Ruiz

Marcelino Ruiz testified that he was working in Respondent's establishment behind the counter. The counter is an enclosed area, with glass – perhaps bullet-proof glass, he was not sure – extending from the counter to the ceiling, and a locked door through which access behind the counter may be gained. According to Mr. Ruiz two DPD officers entered Respondent's premises, chased off three customers, and then demanded to know where illegal drugs and drug paraphernalia were being kept. According to Mr. Ruiz they did not state they were conducting a Commission investigation. Approximately three minutes later Mr. Reid entered. According to Mr. Ruiz, Mr. Reid refused to identify himself, failed to display a badge, and beat on the locked door demanding entrance behind the counter. Mr. Ruiz testified he had been told by Petitioner not to allow DPD officers behind the counter unless they had a warrant. In addition, he testified he would not let the DPD officers behind the counter because they were threatening him with weapons. He telephoned Petitioner to tell her that DPD officers were threatening him. She told him she was on her way and to stay still until she arrived. A DPD officer then announced that Mr. Ruiz was wanted on an outstanding robbery warrant, kicked down the door leading behind the counter, and arrested Mr. Ruiz. In Mr. Ruiz's opinion, Respondent's establishment has been harassed by DPD officers in the past. DPD officers, according to Mr. Ruiz, "don't follow the rules."

2. Petitioner

Catrina Reece, Petitioner, testified that she began selling beer and wine at her establishment in 2011. She testified she has always cooperated with all prior inspections required by the Commission, and it was not her intent for her employee, who had only worked for her for approximately two months, to hinder a Commission inspection. She further testified that DPD officers have harassed her and her customers in the past about illegal drug activity in the area, with the harassment reaching such a point she filed a complaint with DPD about its behavior. This, in her opinion, has resulted in retaliation and increased harassment by DPD.

IV. ANALYSIS

The evidence shows that on November 16, 2011, a properly identified Commission agent in the company of uniformed DPD officers requested access behind the sales counter of Petitioner's establishment for the purpose of conducting an inspection. Respondent's employee refused entrance to both the Commission agent and the police officers. Respondent was informed by her employee that he was preventing an inspection. She told him to wait until she arrived.

By accepting a license or permit, the holder consents to allow the Commission, an authorized representative of the Commission, or a peace officer to enter the licensed premises at any time to conduct an investigation or inspect the premises for the purpose of performing any duty imposed by the Code. Tex. Alco. Bev. Code § 101.04. Petitioner's employee in the instant case refused to permit, or interfered with, an inspection of the licensed premises by an authorized representative of the Commission or a peace officer. Tex. Alco. Bev. Code § 61.71 (a)(1) & (14). Whether Petitioner's complaint about the alleged DPD harassment is legitimate or not, Petitioner and her employees are still required to abide by the requirements under the Code. The actions of Petitioner's employee in the instant case constituted a violation of the Code.

V. RECOMMENDATION

The evidence shows that Petitioner's employee violated Tex. Alco. Bev. Code §§ 61.71 (a)(1) & (14) and 101.04. Commission Staff requested at the hearing that Respondent be subject to a suspension of thirteen days or a civil fine of \$3,900.00 for these violations. Accordingly, the ALJ recommends that Respondent should be subject to a suspension of thirteen days or a civil fine of \$3,900.00.

VI. FINDINGS OF FACT

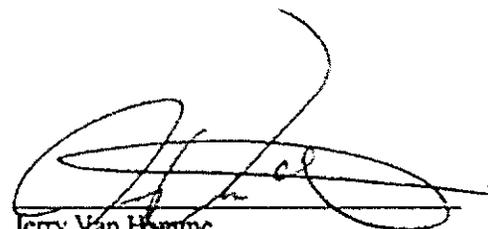
1. On November 16, 2011, Catrina K. Reece d/b/a Up In Smoke Discount, 1616 S. Ewing Avenue, Dallas, Dallas County, Texas (Respondent) held a Wine and Beer Retailer's Off-Premise Permit, BQ-769139.
2. On that date, Marcelino Ruiz was employed by Respondent working behind the counter as the sales clerk in Respondent's establishment. Access to the area behind the counter is only available through a locked door.
3. Larry Reid, an enforcement agent for the Texas Alcoholic Beverage Commission (Commission), entered Respondent's establishment to conduct an inspection.
4. Mr. Reid was accompanied by uniformed Dallas Police Department (DPD) officers.
5. Mr. Reid identified himself to Mr. Ruiz as a Commission enforcement agent and informed Mr. Ruiz that he was present for the purpose of inspecting the premises.
6. Mr. Reid requested that Mr. Ruiz open the locked door and allow him access behind the counter to conduct the inspection.
7. Mr. Ruiz refused to allow Mr. Reid access behind the counter for the purpose of inspecting the premises.
8. Mr. Reid spent approximately five-to-ten minutes explaining to Mr. Ruiz that he was attempting to conduct a Commission-authorized inspection.
9. Mr. Ruiz made a phone call to Catrina Reece, Petitioner, informing her that Mr. Reid had requested to come behind the counter for the purpose of inspecting the premises.

10. Petitioner did not tell Mr. Ruiz to allow Mr. Reid access behind the counter.
11. After talking to Petitioner, Mr. Ruiz continued to refuse Mr. Reid access behind the counter.

VII. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of Chapter 5 § 6.01.
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 ch. 2003.
3. Proper and timely notice of the hearing was effected on all parties pursuant to the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and 1 Tex. Admin. Code § 155.401.
4. Respondent's employee refused to permit, or interfered with, an inspection of the licensed premises by an authorized representative of the Commission or a peace officer. Tex. Alco. Bev. Code §§ 61.71 (a)(1) & (14); 101.04.
5. Respondent's permit should be subject to a suspension of thirteen days or Respondent should pay a civil fine of \$3,900.00. Tex. Alco. Bev. Code § 61.71 (a)(1) & (14).

SIGNED 20 day of December, 2012.



Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings

DOCKET NO. 607767

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
VS.	§	
	§	
CATRINA K. REECE D/B/A UP IN SMOKE DISCOUNT, Respondent	§	ALCOHOLIC
	§	
PERMIT/LICENSE NO. BQ769139	§	
	§	
DALLAS COUNTY, TEXAS (SOAH DOCKET NO. 458-12-5298)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION on this the 22nd day of March, 2013, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Jerry Van Hamme presiding. The hearing convened on October 24, 2012 and the SOAH record 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 December 20, 2012. 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. The Administrative Law Judge granted Respondent's request for additional time in which to file exceptions, but that deadline has passed and no exceptions have been filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

THEREFORE, IT IS ORDERED that the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on **April 24, 2013**, and shall remain suspended for **THIRTEEN (13)** consecutive days **UNLESS** Respondent pays a civil penalty in the amount of **\$3,900.00 ON OR BEFORE April 16, 2013**.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$3,900.00** on or before the **tenth (10th)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18th)** day following the date the judgment is signed and shall remain suspended for **THIRTEEN (13)** consecutive days.

This Order will become final and enforceable on the 15th day of April, 2013, unless a Motion for Rehearing is filed on or before the 14th day of April, 2013.

SIGNED this the 22nd day of March, 2013, at Austin, Texas.



Sherry K-Cook, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 22nd day of March, 2013.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Jerry VanHamme
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
6333 Forest Park Road, Suite 150A
Dallas, Texas 75235
VIA FACSIMILE: 512.322.0471

Catrina K. Reece
d/b/a Up In Smoke Discount
RESPONDENT
1318 Thunderbrook Circle
Desoto, Texas 75115
VIA REGULAR MAIL AND
VIA CMRRR# 70120470000133005759

James L. Guinan
Wyde & Associates
ATTORNEY FOR RESPONDENT
3131 Turtle Creek Blvd.
Suite 901
Dallas, Texas 75219
VIA REGULAR MAIL
AND VIA FACSIMILE: 214.521.9130

Shelia A. Lindsey
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA EMAIL AT:
shelia.lindsey@tabc.state.tx.us

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 607767

REGISTER NUMBER:

NAME: Catrina K. Reece

TRADENAME: Up in Smoke Discount

ADDRESS: 1616 S. Ewing Ave., Dallas, Texas

DUE DATE: April 16, 2013

PERMITS OR LICENSES: BQ769139

AMOUNT OF PENALTY: \$3,900.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION

P.O. Box 13127

Austin, Texas 78711

Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include the Docket # on your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.