

SOAH DOCKET NO. 458-98-1548

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
§
HUONG T. HUYNH § OF
D/B/A LEON'S DRIVE IN GROCERY §
PERM NO. BG-196309 §
HARRIS COUNTY, TEXAS §
(TABC CASE NO. 566327) § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Petitioner) brought this action against a permittee of the commission for selling a beer to an intoxicated person on September 8, 1995 and for selling a beer to an intoxicated person on March 22, 1996, both sales being in violation of §61.71(b)(14) of the Texas Alcoholic Beverage Code. The Staff recommended that the permit be suspended for 21 days. The permittee failed to appear at the hearing either in person or by counsel. Having found that beer was sold to an intoxicated individual by an agent, servant, or employee of the licensee on both occasions, the Administrative Law Judge recommends that the permit be suspended for a period of 21 days.

I. Procedural History

On September 1, 1998, the Staff of the Commission (the Staff), notified Huong T. Huynh, d/b/a Leon's Drive In Grocery (the Respondent), that the Staff would seek disciplinary action against the Respondent's permit because an agent, servant or employee of Respondent sold an alcoholic beverage to an intoxicated person on September 8, 1995, and on March 22, 1996. The Staff asserted that such acts constituted grounds for suspension or cancellation of the Respondent's Wine and Beer Retailer's Off-Premise Permit.

The hearing commenced on November 4, 1998, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Harris County, Texas. After the taking of evidence, the hearing was concluded but the record was left open until November 18, 1998, at 5:00 p.m. for the filing of posthearing briefs and proposed findings of fact and conclusions of law by the parties. No posthearing filings were made by Respondent. The Staff did file proposed findings of fact and conclusions of law, and the record was closed on November 18, 1998 at 5:00 p.m. The Staff was represented by Dewey Bracken, Assistant Attorney General of Texas. The Respondent failed to appear though properly notified of the date, time and location of the hearing.

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II. Jurisdiction and Notice

The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §6.01 and TEX. GOV'T. CODE ANN. Chapter 2001 *et seq.* (Vernon 1999). The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. Chapter 2003.

Benjamin J. Durant wrote to the Commission's legal division on February 28, 1996, advising that he would be representing Respondent in this matter and giving a postal address of 4810 Caroline, Houston, Texas 77004, as indicated in Exhibit 3. About September 1, 1998, notice of the hearing was properly addressed and sent by certified mail to the Respondent's attorney, Benjamin J. Durant, at 4810 Caroline Street, Houston, Texas 77004, pursuant to TEX. GOV'T. CODE ANN. Chapter 2001. On September 17, 1998, an *Order Setting Hearing and Setting Out Prehearing Requirements* was properly served upon all parties by facsimile transmission. The telephonic prehearing was held on October 28, 1998, and while the Petitioner was available for such prehearing, the Respondent's attorney of record did not make himself available. At the hearing, Staff offered into evidence Exhibit 4, which was the notice of hearing and its signed certified mail return receipt. The notice of hearing advised Respondent that the hearing would be had at 1:30 p.m. on November 4, 1998, in the offices of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas. On November 4, 1998, Petitioner's attorney appeared and took part in the hearing pursuant to those notices and orders and presented evidence. Respondent failed to appear.

III. Discussion

Petitioner offered into evidence two (2) affidavits by Brian L. Guenther, Licensing Department Director for the Texas Alcoholic Beverage Commission (Exhibits 1 and 2).

The Respondent holds a Wine and Beer Retailer's Off-Premise Permit, BQ-196309 issued by the commission originally as a Wine and Beer Retailer's Permit on the 13th of June 1985 and changed to a Wine and Beer Retailer's Off-Premise Permit on 13th of June, 1998, as shown in Exhibit 1. A copy of the violation history for such permit was provided by Exhibit 2.

Section 11.61(b) of the Code states:

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

. . . . (14) the permittee sold or delivered an alcoholic beverage to an intoxicated person[.].

The Respondent failed to appear and take part in the hearing of which he had proper and timely notice. The factual allegations in the notice of hearing will be deemed admitted as true.

PROPOSED FINDINGS OF FACT

1. On September 1, 1998, the Staff of the Texas Alcoholic Beverage Commission sent, by certified mail, return receipt requested, a Notice of Hearing to Respondent Huong T. Hyunh d/b/a Leon's Drive In Grocery, through his attorney of record, setting out the charges and stating that a hearing would be held on the allegations at 1:30 p.m. on November 4, 1998 at the office of the State Office of Administrative Hearings, 2020 North Loop West, Suite 111, Houston, Texas.
2. Respondent received this notice in a timely manner.
3. The Staff of the Texas Alcoholic Beverage Commission appeared at the hearing at the scheduled time and place; neither Respondent or his attorney appeared.
4. Respondent has not contested the violations alleged in the Notice of Hearing.
5. On or about September 8, 1995, an agent, servant or employee of Respondent did then and there on the premise sell, serve, or deliver beer to an intoxicated person.
6. On or about March 22, 1996, an agent, servant or employee of Respondent did then and there on the premise sell, serve, or deliver beer to an intoxicated person.

PROPOSED CONCLUSIONS OF LAW

1. Proper and timely notice was given by the Staff of the Texas Alcoholic Beverage Commission to all parties legally entitled to notice in accordance with TEX. GOV'T. CODE ANN. §2001.054 (Vernon 1999) and 1 TEX. ADMIN. CODE, Chapter 155.
2. Proper notice under TEX. GOV'T CODE Chapter 2001 and §155.27 of the SOAH Rules of Practice and Procedure and containing disclosure, in 10-point, bold-face type, of the fact that upon failure of the party to appear at the hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice may be granted by default was given.
3. The State Office of Administrative Hearings has jurisdiction in matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T. CODE ANN. Chapter 2001 (Vernon 1999).
4. Based on findings of fact numbers 3 - 6 and the conclusions of law, the Commission is authorized to suspend or cancel the Respondent's permit under Section 11.61 of the Texas Alcoholic Beverage Code.
5. The Texas Alcoholic Beverage Commission is authorized to suspend or cancel the Respondent's permit under Section 11.61 of the Texas Alcoholic Beverage Code.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that the Respondent's Wine and Beer Retailer's Off-Premise Permit, BQ-196309 be suspended for a period of twenty-one (21) days.

SIGNED this 21 day of March, 1999.



REX SHAVER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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