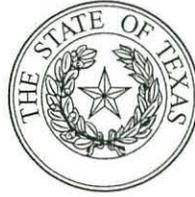


State Office of Administrative Hearings 606273



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED
MAY 17 2012
TABCHOUSTON
LEGAL

May 15, 2012

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
S & S SWEET SHOP d/b/a S & S SWEET SHOP
SOAH DOCKET NO. 458-12-4483**

Dear Mr. Steen:

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 handwritten signature in black ink, appearing to read "Kyle Groves".

Kyle Groves
Administrative Law Judge

KG/slp
Enclosure

Xc: ✓ Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 427 W. 20th St., Ste. 600, Houston, Texas 77008
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 5806 Mesa Drive, Austin Texas 78731
Michael Bernoudy, Jr., Attorney for Respondent, VIA REGULAR MAIL, 2400 W. Grand Ave., Marshall, Texas 75670

DOCKET NO. 458-12-4483

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
	§	
Petitioner	§	
	§	
V.	§	OF
	§	
S & S SWEET SHOP	§	
D/B/A S & S SWEET SHOP,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

S & S Sweet Shop (Respondent) is the holder of a wine-only package store permit and a beer retailer's off-premise license issued by Petitioner (TABAC/Staff) for the premises located at 1100 W. Grand Avenue, Marshall, Harrison County Texas. Staff seeks a 60-day suspension or a \$300 per day civil penalty, totaling \$18,000, in lieu of the suspension. Staff alleges Respondent, Respondent's agent, servant, or employee, purchased, sold, offered to sell, distributed, or delivered an alcoholic beverage on the licensed premises while the license was under suspension, in violation of Tex. Alco. Bev. Code §§ 11.68, 11.61(b)(2), 61.71(a)(1) and (22).

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds Respondent did not violate the applicable statutes.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, or venue in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further

discussion here.

On March 8, 2012, a hearing convened at the State Office of Administrative Hearings (SOAH) in Tyler, Texas, before ALJ Kyle J. Groves. Respondent was represented by attorney Michael L. Bernoudy, and Staff was represented by attorney Sandra K. Patton. The record remained open until March 20, 2011, so the parties could file written closing arguments.

II. LEGAL STANDARD AND DISCUSSION

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 the permittee violated a provision of this code or a rule of the commission.¹ 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 purchased, sold, offered for sale, distributed, or delivered an alcoholic beverage, or consumed an alcoholic beverage or permitted one to be consumed on the licensed premises while his license was under suspension.²

An appeal from an order of the commission or administrator refusing, cancelling, or suspending a permit or license may be taken to the district court of the county in which the applicant, licensee, or permittee resides or in which the owner of involved real or personal property resides. The appeal shall be under the substantial evidence rule and against the commission alone as defendant. The rules applicable to ordinary civil suits apply, with the following exceptions, which shall be construed literally: (1) the appeal shall be perfected and filed within 30 days after the date the order, decision, or ruling of the commission or administrator becomes final and appealable; (2) the case shall be tried before a judge within 10 days from the date it is filed; (3) neither party is entitled to a jury; and (4) the order, decision, or ruling of the commission or administrator may be

¹ Tex. Alco. Bev. Code § 11.61 (b)(2)

² Tex. Alco. Bev. Code § 61.71 (a)(22)

suspended or modified by the court pending a trial on the merits, but the final judgment of the district court may not be modified or suspended pending appeal.³

In computing a period of days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.⁴

The parties stipulated that Respondent sold an alcoholic beverage at his licensed premises on September 13, 2011. Admitted into evidence was the administrative history of Respondent. Included in this history was an administrative law judge's proposal for decision dated December 8, 2010, that recommended Respondent's license and permit be suspended for 40 days. This proposal for decision was adopted in an order issued May 4, 2011, by an assistant administrator of the TABC. Respondent filed a motion for rehearing on May 27, 2011. This motion was denied in an order issued by the TABC on June 16, 2011. Both orders stated, "If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of \$12,000 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 FORTY (40) consecutive days."

On July 5, 2011, Respondent filed an appeal with the 71st Judicial District Court, Harrison County Texas. On October 14, 2011, the District Court issued an order affirming the administrative decision. In the order, the District Court stated that since no judgment was rendered within ten (10) days of Respondent filing his appeal, the court was divested of its jurisdiction after July 15, 2011. The District Court further stated that it was only observing its ministerial duty by entering judgment

³ Tex. Alco. Bev. Code § 11.67 (a) and (b)

⁴ Tex. Govt. Code § 311.014

affirming the administrative decision and order.

It is Respondent's position that Respondent's license and permit were not under suspension when Respondent sold an alcoholic beverage on September 13, 2011. Respondent believes that the 18 days stated in the TABC orders did not begin to run until his appeal was denied by the District Court on October 14, 2011. Therefore, Respondent believes the suspension should not have started until November 1, 2011.

Petitioner argues that Tex. Alco. Bev. Code § 11.67 requires that the appeal be tried before a judge within 10 days from the date it is filed. If the case is not tried and an order issued within this time frame, the court loses its jurisdiction and the time period stated in the TABC orders begins to run. According to Petitioner, and the administrative record admitted into evidence, Respondent's suspension began September 3, 2011.

It appears that Petitioner's legal argument is sound. However, the date the suspension began is August 3, 2011, not September 3, 2011. The District Court lost jurisdiction 10 days after Respondent filed his appeal on July 5, 2011. Therefore, the 18-day clock began July 16, 2011, and the suspension started August 3, 2011. The suspension ran for 40 days ending September 12, 2011. The stipulated sale of an alcoholic beverage took place the day after the suspension ended, September 13, 2011. Respondent's license and permit should not be suspended nor should Respondent be fined.

III. FINDINGS OF FACT

1. S & S Sweet Shop (Respondent) is the holder of a wine-only package store permit and a beer retailer's off-premise license issued by Petitioner (TABC/Staff) for the premises located at 1100 W. Grand Avenue, Marshall, Harrison County Texas.
2. Staff alleges that Respondent, Respondent's agent, servant, or employee, purchased, sold, offered to sell, distributed, or delivered an alcoholic beverage on the licensed premises while the license was under suspension.

3. Staff seeks a 60-day suspension or a \$300 per day civil penalty, totaling \$18,000, in lieu of the suspension.
4. On February 10, 2012, Staff issued a notice of hearing that included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
5. The hearing was held March 8, 2012, in Tyler, Smith County, Texas, before ALJ Kyle Groves, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings. The record remained open until March 20, 2012, so the parties could file written closing arguments.
6. Respondent's license and permit were suspended from August 3, 2011 to September 12, 2011.
7. Respondent sold an alcoholic beverage on September 13, 2011.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. 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. Alco. Bev. Code ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, Tex. Govt Code §§ 2001.051 and 2001.052; Tex. Alco. Bev. Code § 11.63; and 1 Tex. Admin. Code (TAC) § 155.401.
4. Based on the Findings of Fact, Respondent did not sell an alcoholic beverage on the licensed premises while his license was under suspension. Tex. Alco. Bev. Code § 61.71(a)(22).

5. Based on the Findings of Fact and Conclusions of Law, Respondent's license and permit should not be suspended, and a fine should not be levied in lieu of the suspension.

Issued May 15, 2012



Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings

State Office of Administrative Hearings

606273



Cathleen Parsley
Chief Administrative Law Judge

May 21, 2012

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

VIA REGULAR MAIL

**RE: TEXAS ALCOHOLIC BEVERAGE COMMISSION VS.
S&S SWEET STOP d/b/a S&S SWEET STOP
SOAH DOCKET NO. 458-12-4483**

RECEIVED

MAY 25 2012

TABC HOUSTON
LEGAL

Dear Mr. Steen:

Please find enclosed an Amended 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 handwritten signature in black ink, appearing to read "KJ Groves", with a long horizontal flourish extending to the right.

Kyle J. Groves
Administrative Law Judge

KJGlan
Enclosure

Xc: Sandra Patton, Staff Attorney, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 427 W. 20th Street Suite 600, Houston, Texas 77008
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, VIA REGULAR MAIL 5806 Mesa Drive, Austin Texas 78731
Michael Bernoudy Jr., Attorney for Respondent, VIA REGULAR MAIL, 2400 W. Grand Ave. Marshall, Texas 75670

DOCKET NO. 458-12-4483

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
	§	
Petitioner	§	
	§	
V.	§	OF
	§	
S & S SWEET STOP	§	
D/B/A S & S SWEET STOP,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

AMENDED PROPOSAL FOR DECISION

S & S Sweet Stop (Respondent) is the holder of a wine-only package store permit and a beer retailer's off-premise license issued by Petitioner (TABC/Staff) for the premises located at 1100 W. Grand Avenue, Marshall, Harrison County Texas. Staff seeks a 60-day suspension or a \$300 per day civil penalty, totaling \$18,000, in lieu of the suspension. Staff alleges Respondent, Respondent's agent, servant, or employee, purchased, sold, offered to sell, distributed, or delivered an alcoholic beverage on the licensed premises while the license was under suspension, in violation of Tex. Alco. Bev. Code §§ 11.68, 11.61(b)(2), 61.71(a)(1) and (22).

After considering the arguments and evidence presented by the parties, the Administrative Law Judge (ALJ) finds Respondent did not violate the applicable statutes.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction, notice, or venue in this proceeding. Therefore, those matters are set out in the proposed findings of fact and conclusions of law without further

discussion here.

On March 8, 2012, a hearing convened at the State Office of Administrative Hearings (SOAH) in Tyler, Texas, before ALJ Kyle J. Groves. Respondent was represented by attorney Michael L. Bernoudy, and Staff was represented by attorney Sandra K. Patton. The record remained open until March 20, 2011, so the parties could file written closing arguments.

II. LEGAL STANDARD AND DISCUSSION

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 the permittee violated a provision of this code or a rule of the commission.¹ 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 purchased, sold, offered for sale, distributed, or delivered an alcoholic beverage, or consumed an alcoholic beverage or permitted one to be consumed on the licensed premises while his license was under suspension.²

An appeal from an order of the commission or administrator refusing, cancelling, or suspending a permit or license may be taken to the district court of the county in which the applicant, licensee, or permittee resides or in which the owner of involved real or personal property resides. The appeal shall be under the substantial evidence rule and against the commission alone as defendant. The rules applicable to ordinary civil suits apply, with the following exceptions, which shall be construed literally: (1) the appeal shall be perfected and filed within 30 days after the date the order, decision, or ruling of the commission or administrator becomes final and appealable; (2) the case shall be tried before a judge within 10 days from the date it is filed; (3) neither party is entitled to a jury; and (4) the order, decision, or ruling of the commission or administrator may be

¹ Tex. Alco. Bev. Code § 11.61 (b)(2)

² Tex. Alco. Bev. Code § 61.71 (a)(22)

suspended or modified by the court pending a trial on the merits, but the final judgment of the district court may not be modified or suspended pending appeal.³

In computing a period of days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or legal holiday.⁴

The parties stipulated that Respondent sold an alcoholic beverage at his licensed premises on September 13, 2011. Admitted into evidence was the administrative history of Respondent. Included in this history was an administrative law judge's proposal for decision dated December 8, 2010, that recommended Respondent's license and permit be suspended for 40 days. This proposal for decision was adopted in an order issued May 4, 2011, by an assistant administrator of the TABC. Respondent filed a motion for rehearing on May 27, 2011. This motion was denied in an order issued by the TABC on June 16, 2011. Both orders stated, "If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of \$12,000 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 FORTY (40) consecutive days."

On July 5, 2011, Respondent filed an appeal with the 71st Judicial District Court, Harrison County Texas. On October 14, 2011, the District Court issued an order affirming the administrative decision. In the order, the District Court stated that since no judgment was rendered within ten (10) days of Respondent filing his appeal, the court was divested of its jurisdiction after July 15, 2011. The District Court further stated that it was only observing its ministerial duty by entering judgment

³ Tex. Alco. Bev. Code § 11.67 (a) and (b)

⁴ Tex. Govt. Code § 311.014

affirming the administrative decision and order.

It is Respondent's position that Respondent's license and permit were not under suspension when Respondent sold an alcoholic beverage on September 13, 2011. Respondent believes that the 18 days stated in the TABC orders did not begin to run until his appeal was denied by the District Court on October 14, 2011. Therefore, Respondent believes the suspension should not have started until November 1, 2011.

Petitioner argues that Tex. Alco. Bev. Code § 11.67 requires that the appeal be tried before a judge within 10 days from the date it is filed. If the case is not tried and an order issued within this time frame, the court loses its jurisdiction and the time period stated in the TABC orders begins to run. According to Petitioner, and the administrative record admitted into evidence, Respondent's suspension began September 3, 2011.

It appears that Petitioner's legal argument is sound. However, the date the suspension began is August 3, 2011, not September 3, 2011. The District Court lost jurisdiction 10 days after Respondent filed his appeal on July 5, 2011. Therefore, the 18-day clock began July 16, 2011, and the suspension started August 3, 2011. The suspension ran for 40 days ending September 12, 2011. The stipulated sale of an alcoholic beverage took place the day after the suspension ended, September 13, 2011. Respondent's license and permit should not be suspended nor should Respondent be fined.

III. FINDINGS OF FACT

1. S & S Sweet Stop (Respondent) is the holder of a wine-only package store permit and a beer retailer's off-premise license issued by Petitioner (TABC/Staff) for the premises located at 1100 W. Grand Avenue, Marshall, Harrison County Texas.
2. Staff alleges that Respondent, Respondent's agent, servant, or employee, purchased, sold, offered to sell, distributed, or delivered an alcoholic beverage on the licensed premises while the license was under suspension.

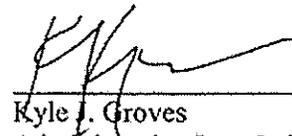
3. Staff seeks a 60-day suspension or a \$300 per day civil penalty, totaling \$18,000, in lieu of the suspension.
4. On February 10, 2012, Staff issued a notice of hearing that included a statement regarding the time, place, and nature of the hearing; referenced the legal authority upon which the hearing would be held; cited the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
5. The hearing was held March 8, 2012, in Tyler, Smith County, Texas, before ALJ Kyle Groves, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings. The record remained open until March 20, 2012, so the parties could file written closing arguments.
6. Respondent's license and permit were suspended from August 3, 2011 to September 12, 2011.
7. Respondent sold an alcoholic beverage on September 13, 2011.

VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Tex. Alco. Bev. Code Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. 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. Alco. Bev. Code ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, Tex. Govt Code §§ 2001.051 and 2001.052; Tex. Alco. Bev. Code § 11.63; and 1 Tex. Admin. Code (TAC) § 155.401.
4. Based on the Findings of Fact, Respondent did not sell an alcoholic beverage on the licensed premises while his license was under suspension. Tex. Alco. Bev. Code § 61.71(a)(22).

5. Based on the Findings of Fact and Conclusions of Law, Respondent's license and permit should not be suspended, and a fine should not be levied in lieu of the suspension.

Issued May 21, 2012



Kyle J. Groves
Administrative Law Judge
State Office of Administrative Hearings