

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 5, 1999

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

HAND DELIVERY

RE: Docket No. 458-99-0444; Texas Alcoholic Beverage Commission vs. William Russell, Jr. dba Shorty's; (TABC Case No. 581917)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Dewey Brackin, attorney for Texas Alcoholic Beverage Commission, and to William Russell, Jr. dba Shorty's, Respondent. For reasons discussed in the proposal, I recommend Respondent's permit be canceled.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

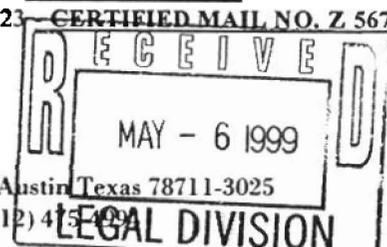
Sincerely,

Ann Landeros
Administrative Law Judge

AL:dc
Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing - **HAND DELIVERY**
Dewey Brackin, Staff Attorney, Texas Alcoholic Beverage Commission - **HAND DELIVERY**
William Russell, Jr., Shorty's, 6802 De Paul CV, Austin, TX 78723-2223 - **CERTIFIED MAIL NO. Z 567**
739 453, RETURN RECEIPT REQUESTED

William P. Clements Building
Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin, Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4993



DOCKET NO. 458-99-0444

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION, PETITIONER	§	
	§	
VS.	§	
	§	OF
WILLIAM RUSSELL, JR.,	§	
D/B/A SHORTY'S	§	
BASTROP COUNTY, TEXAS,	§	
RESPONDENT	§	
(TABC CASE NO. 581917)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this action seeking a cancellation of William Russell, Jr., d/b/a Shorty's (Respondent) Beer Retailer's On Premise License for paying for beer and its containers with dishonored checks on three occasions. Following a hearing that Respondent failed to attend, the Administrative Law Judge recommends that the permit be canceled.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) Subchapter B of Chapter 5 and § 61.73(b). The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§2003.021 and 2003.042.

On March 11, 1999, Staff notified Respondent that a hearing would be convened to consider sanctions against Respondent's Beer Retailer's On Premise License based upon Respondent's issuance of dishonored checks to pay for beer. The notice contained a statement of the matters asserted against Respondent; the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and a reference to the statutes and rules involved. (Exhibit 2). Additionally, it contained the language in 10-point type required by the State Office of Administrative Hearings (SOAH) default rule. 1 TEX. ADMIN. CODE (TAC) § 155.55. The notice was sent certified mail to Respondent's permitted address as listed in the Commission's files, 111 S. Avenue C, Elgin, Bastrop County, Texas. The notice of hearing, sent certified mail, was returned unclaimed to Staff. Staff complied with its duty to notify Respondent in accordance with TEX. GOV'T. CODE ANN. §§2001.051 and 2001.054(c).

On April 14, 1999, Administrative Law Judge Ann Landeros convened the hearing in this matter at the Hearings Facility of the State Office of Administrative Hearings, 1700 N. Congress, Suite 1100, Austin, Texas. Staff was represented by Dewey Brackin, Staff Attorney. Respondent did not appear and was not represented at the hearing. Evidence was received, and the hearing closed that same day.

II. Discussion

Respondent holds Beer Retailer's On Premise License BE285077 issued by the Commission on April 30, 1998, for the business known as Shorty's, located at 111 S. Ave C, Elgin, Texas.

Pursuant to § 61.73(b) of the Code, 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 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. The Code, at § 11.61(b)(2), authorizes the commission or administrator to suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that a permittee violated a provision of this code or a rule of the commission. Based on Respondent's failure to appear after being sent notice of the hearing, Staff was entitled to a default judgment pursuant to 1 TAC § 155.55.

Staff offered into evidence the affidavit of Sean R. Erney, a representative of Brown Distributing Company. The affidavit states that on August 4, 1998, Respondent paid Brown Distributing Company for beer and the beer's containers with a check that was dishonored by the drawee bank on August 21, 1998 for insufficient funds. This check was returned unpaid to Brown Distributing Company. (Exhibit 3).

Staff offered into evidence a second affidavit of Sean R. Erney, a representative of Brown Distributing Company. The affidavit states that on August 14, 1998, Respondent paid Brown Distributing Company for beer and the beer's containers with a check that was dishonored by the drawee bank on August 27, 1998 for insufficient funds. This check was returned unpaid to Brown Distributing Company. (Exhibit 3).

Staff also offered into evidence the affidavit of Jane H. Wright, a representative of Wright Distributing Company, Inc. The affidavit states that on November 24, 1998, Respondent paid Wright Distributing Company, Inc., for beer and the beer's containers with a check that was dishonored by the drawee bank on December 1, 1998. The dishonored check was returned unpaid to Wright Distributing Company, Inc. (Exhibit 3).

Staff proved that on three occasions Respondent paid for beer and the containers and packages containing the beer with checks that were dishonored by the drawee banks for insufficient funds. Under the applicable Code provisions, Respondent's permit is subject to cancellation for paying for beer with dishonored checks. By not appearing at the hearing, Respondent forfeited its opportunity to show why it should retain its permit. The ALJ concurs with Staff's recommendation that the permit be cancelled.

**IV.
Proposed Findings of Fact**

1. On March 11, 1999, Staff mailed a properly addressed notice of hearing to William Russell, Jr., d/b/a Shorty's (Respondent) at its Elgin, Texas mailing address as listed in the records of the Texas Alcoholic Beverage Commission's (Commission) records. The notice contained a statement of the matters asserted against it; the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and a reference to the statutes and rules involved.
2. Respondent did not appear and was not represented at the hearing in this matter held April 14, 1999.
3. Since April 30, 1998, Respondent has held Beer Retailer's On Premise License BE285077 issued by the Commission.
4. On August 4, 1998, and August 14, 1998, Respondent paid Brown Distributing Company for beer and the containers and packages containing the beer with a check that was dishonored by the drawee bank for insufficient funds and was returned unpaid to Brown Distributing Company.
5. On November 24, 1998, Respondent paid Wright Distributing Company, Inc., for beer and the containers and packages containing the beer with a check that was dishonored by the drawee bank for insufficient funds and was returned unpaid to Wright Distributing Company, Inc.

**V.
Proposed Conclusions of Law**

1. Service of proper and timely notice of the hearing was effected upon Respondent, pursuant to TEX. ALCO. BEV. CODE (Code) § 11.61(b) and TEX. GOV'T CODE ANN. §§ 2001.051, 2001.052 and 2001.054(c).
2. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to Subchapter B of Chapter 5 and § 61.73 of the Code. 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 conclusion of law, pursuant to TEX. GOV'T CODE ANN. §§2003.021(B) and 2003.042(5).
3. Pursuant to § 61.73(b) of the Code, 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 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.

4. The Code, at § 11.61(b)(2), authorizes the commission or administrator to suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that a permittee violated a provision of this code or a rule of the commission.
5. Based on Findings of Fact Nos. 1 and 2 and Conclusion of Law No. 1, Staff is entitled to a default judgment against Respondent pursuant to 1 TAC § 155.55.
6. Based upon Findings of Fact Nos. 4 and 5 and Conclusions of Law Nos. 3 and 4, Respondent is in violation of § 61.73(b) of the Code.
7. Based upon the foregoing, Respondent's Beer Retailer's On Premise License BE285077 should be canceled.

SIGNED this 3 day of May 1999.



ANN LANDEROS
Administrative Law Judge
State Office of Administrative Hearings