

DOCKET NO. 586185

|                                 |   |                     |
|---------------------------------|---|---------------------|
| IN RE WILLIAMS WHOLESALERS INC. | § | BEFORE THE          |
| LICENSE NOS. BB000477, BI000478 | § |                     |
| PERMIT NOS. X-219110, O-219111  | § |                     |
|                                 | § | TEXAS ALCOHOLIC     |
|                                 | § |                     |
| NUECES COUNTY, TEXAS            | § |                     |
| (SOAH DOCKET NO. 458-00-0589)   | § | BEVERAGE COMMISSION |

ORDER

**CAME ON FOR CONSIDERATION** this 27th day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl A. Corbitt. The hearing convened on June 8, 2000, and left open to allow the parties to file briefs. No briefs were filed in this case. The hearing was ordered closed on July 1, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 2, 2000. This 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. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

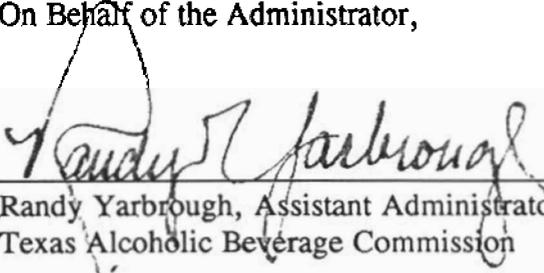
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that License Nos. BB000477, BI000478 and Permit Nos. X-219110, O-219111, are herein **SUSPENDED for a period of three (3) days, beginning at 12:01 A.M. on the 31st day of January, 2001**, unless Respondent pays a civil penalty in the amount of **\$2,250.00** on or before the **24th day of January, 2001**.

**This Order will become final and enforceable on November 17, 2000**, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 27th day of October, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl A. Corbitt  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 504  
Austin, Texas 78701  
VIA FACSIMILE (512) 475-4994

William R. Durrill, President  
Williams Wholesalers Inc.  
**RESPONDENT**  
601 N. 19th Street  
Corpus Christi, Texas 78408  
**CERTIFIED MAIL/RRR NO. Z 473 039 271**

Christopher Burnett  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Corpus Christi District Office

# State Office of Administrative Hearings

OCT - 2

Shelia Bailey Taylor  
Chief Administrative Law Judge  
October 2, 2000

Mr. Doyne Bailey, Administrator  
*Texas Alcoholic Beverage Commission*  
5806 Mesa, Suite 160  
Austin, Texas 78711

HAND DELIVERY

**RE: Docket No. 458-00-0589; Texas Alcoholic Beverage Commission vs. Williams Wholesalers, Inc., d/b/a/ Williams Wholesalers Inc., Lic. Nos. BB-000477, BI-000478; Permit Nos. X-219110, O-219111**

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to William R. Durrill, President, Williams Wholesalers, Inc., d/b/a/ Williams Wholesalers, Inc. (Respondent). For reasons discussed in the Proposal for Decision, this proposal recommends the Respondent's licenses and permits be suspended for three days, or in lieu thereof, to have the Respondent assessed a penalty of \$750.00 per day for the total amount of \$2,250.00.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

Sincerely,

  
Earl A. Corbitt

Administrative Law Judge

ECrk  
Enclosure

cc: Christopher Burnett, Staff Attorney, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY  
Mr. William R Durrill, President, Williams Wholesalers, Inc., 601 N. 19<sup>th</sup> Street, Corpus Christi, Texas 78408 -VIA HAND DELIVERY  
Rommel Corro, Docket Clerk, State Office of Administrative Hearings- VIA HAND DELIVERY

DOCKET NO. 458-00-0589

|                                     |   |                         |
|-------------------------------------|---|-------------------------|
| TEXAS ALCOHOLIC BEVERAGE COMMISSION | § | BEFORE THE STATE OFFICE |
|                                     | § |                         |
|                                     | § |                         |
| VS.                                 | § | OF                      |
| WILLIAMS WHOLESALERS, INC.          | § |                         |
| DBA WILLIAMS WHOLESALERS, INC.      | § |                         |
| LIC. NOS. BB-000477, BI-000478      | § |                         |
| PERMIT NOS. X-219110, O-219111      | § | ADMINISTRATIVE HEARINGS |

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC) sought suspension of the General Distributor's License, Importer's License, General Class B Wholesaler's Permit, and Private Carrier's Permit held by Williams Wholesaler's, Inc. dba Williams Wholesaler's, Inc. (the Respondent) based on an allegation the Respondent, its agent, servant, or employee, sold or gave away promotional items for less than the item manufacturer's regularly published wholesale price. The Staff of TABC (the Staff) sought to have the Respondent's licenses and permits suspended for three days or, in lieu thereof, to have the Respondent assessed a penalty of \$750.00 per day for the total amount of \$2,250.00. The Respondent contended it had not violated the law or rules of TABC and, if it had, the law and rules were vague. This proposal agrees with the recommendation of the Staff.

**I. PROCEDURAL HISTORY, NOTICE & JURISDICTION**

On March 8, 2000, notice of the hearing was sent by certified mail, return receipt requested, to the Respondent at 601 North 19<sup>th</sup> Street, Corpus Christi, Texas 78408. The Respondent received the notice. The hearing convened on June 8, 2000, before Administrative Law Judge (ALJ) Edel P. Ruiseco at the offices of the State Office of Administrative hearings (SOAH) at 1225 North Agnes, Suite 102, Corpus Christi, Texas. Staff Attorney Christopher Burnett represented the Staff. The Respondent was represented by its president, William R. Durrill. After receipt of the evidence, the record was left open to allow the parties to file briefs. No briefs were filed in this case. The hearing was ordered closed on July 1, 2000.

On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt for preparation of the proposal for decision. The undersigned ALJ has reviewed the record in the case including the audio tape of the hearing and Exhibit No. 1. Exhibit No. 2, a group of 22 buckets, was not forwarded with the record of the case. Exhibit No. 2 was not reviewed by the undersigned.

## II. REASONS FOR DECISION

### A. Legal Standard

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Texas Alcoholic Beverage Code (the Code) or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 11.61(b)(2).

Section 61.74(a) of the Code provides:

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal general, local, or branch distributor's license if it is found, after notice and hearing, that the licensee: (1) violated a provision of this code or a rule of the commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period . . . .

Section 102.15 of the Code provides:

No manufacturer or distributor directly or indirectly, or through a subsidiary, affiliate, agent, employee, officer, director, or firm member, may: (1) furnish, give, or lend any money or other thing of value to a person engaged or about to be engaged in selling brewery products for on-premises or off-premises consumption, or give the person any money or thing of value for his use, benefit, or relief . . . .

The rules of TABC provide at 16 TEX. ADMIN. CODE §45.113:

(b) . . . Manufacturers and distributors may furnish novelty items . . . to consumers.  
(1) Novelty items are things designed to advertise or promote a specific product or brand. Such items may have a utilitarian function in addition to product promotion.  
(2) Such items may not exceed a value of \$1.00 per unit wholesale cost.  
. . . .

(c) . . . Distributors and members of the manufacturing tier authorized to sell to retailers may sell promotional items to retailers. . .  
(3) Promotional items may not be sold for less than the item manufacturer's regularly published wholesale price. Payment must be in cash, paid on or before delivery.

### B. Evidence

Two exhibits were admitted into evidence. They included: (1) TABC records including copies of the Respondent's licenses and permits and (2) 22 buckets. None of the buckets were forwarded with the record of the hearing and were not viewed by the undersigned ALJ. TABC Agent Arthur Lee Munsell testified for TABC. William R. Durrill testified for the Respondent. The undersigned ALJ has taken official notice of the Notice of Hearing issued in this case.

## **1. TABC's Evidence**

Exhibit No. 1 shows that the Respondent was issued General Distributor's License number BB-000477 and Importer's License number BI-000478 by TABC on November 9, 1979. It also shows the Respondent was issued General Class B Wholesaler's Permit number X-219110 and Private Carrier's Permit number O-219111 by TABC on November 20, 1990. The Respondent's licenses and permits have been continuously renewed since their issuance.

TABC offered into evidence 22 ice buckets which were stipulated by the parties to be those seized on June 10, 1999 by TABC Agent Arthur Lee Munsell from Buckets Bar, an establishment licensed by TABC.

Agent Munsell testified that in June 1999 he was sent to conduct an investigation at an establishment known as Buckets Bar. At Buckets Bar, Agent Munsell found a group of ice buckets with the Budweiser logo on them. Agent Munsell questioned the manager about the ice buckets and asked to see the invoice covering their purchase. No invoice was located and, after the bar owner was contacted, the manager informed Agent Munsell that the ice buckets had been given to the bar. The buckets had come from the Respondent.

According to Agent Munsell, four of the 22 buckets were found behind the bar and the rest were stacked in a back room. The bar manager and assistant manager informed Agent Munsell that the buckets were filled with ice, then beer was placed in the buckets and they were delivered to the patrons at the tables.

Agent Munsell questioned Greg Salvo, an employee of the Respondent, who gave a voluntary statement admitting he had given the ice buckets to Buckets Bar. Agent Munsell also questioned a young lady, Becky, a second employee of the Respondent, who gave a voluntary statement. A disciplinary case was made against Mr. Salvo who held a license issued by TABC. As a result of the disciplinary case, a monetary penalty was assessed against Mr. Salvo.

## **2. Respondent's Evidence**

William R. Durrill testified he did not contest that ice buckets were taken to Buckets Bar by the Respondent's employees, Greg Salvo and "Becky." He did not agree that the ice buckets were given to the bar. He contended that Becky passed the buckets out to the patrons of the bar.

Mr. Durrill testified the buckets were a promotional item with a cost of \$0.91. According to Mr. Durrill, his employee, Greg Salvo, had looked at the applicable rules of TABC and had concluded using the buckets as a promotional item would be lawful because the wholesale cost of the buckets was less than \$1.00. Mr. Durrill was convinced the Respondent had not violated the law and should not be penalized.

According to Mr. Durrill, Becky's job is to go to establishments selling products distributed by the Respondent and to interact with the customers. She is to be friendly, talk to the customers, and promote the Respondent's products. She passes out promotional items to the customers. She is not a delivery person who delivers items to establishments.

### **3. Stipulations**

The parties stipulated (1) the wholesale cost of the buckets was \$0.91 each; (2) Exhibit No. 2 was the buckets seized at Buckets Bar by Agent Munsell; and (3) the Respondent's agent or employee, Greg Salvo, had committed a violation and had paid a fine relating to the incident the subject of the instant hearing.

## **III. ANALYSIS AND RECOMMENDATION**

### **A. Analysis**

In this case, TEX. ALCO. BEV. CODE ANN. §102.15 was not cited in the Notice of Hearing as applicable to this case. At the hearing it was referenced by TABC and the Respondent did not object. While the Respondent did not have notice that §102.15 was applicable, the Respondent failed to point out the lack of notice by timely objecting. In essence, TABC amended its Notice of Hearing with the consent of the Respondent. Consequently, the undersigned ALJ has taken into consideration the provisions of §102.15.

The evidence presented by TABC shows that Greg Salvo gave a voluntary statement admitting the ice buckets were given to Buckets Bar for distribution to its patrons. The evidence was hearsay which was not objected to and hence is not denied probative value. The evidence shows the bar manager told Agent Munsell the Respondent gave the ice buckets to Buckets Bar for distribution to its patrons. Again the evidence was hearsay but not objected to. Finally, the parties stipulated that Greg Salvo, in a disciplinary action instituted by TABC, paid a monetary forfeiture for having violated the Code in the distribution of ice buckets at Buckets Bar.

Had Mr. Salvo distributed the ice buckets to bar patrons as stated by Mr. Durrill, he would not have violated the Code. Consequently, his payment of a monetary forfeiture demonstrates that the scenario painted by Mr. Durrill was less than wholly accurate.

Furthermore, Mr. Salvo was acting as an employee or agent of the Respondent when he violated the Code at Buckets Bar. His actions were for the benefit of the Respondent. It is not unfair, therefore, to hold the Respondent responsible in this case, even though the violation appears to have been out of ignorance rather than a deliberate violation.

Section 102.15 of the Code prohibits the Respondent from giving anything of value to a retailer. The Respondent violated that section when it, through its employee or agent, provided free ice buckets to Buckets Bar.

The rules of TABC, at 16 TAC §45.113, state it is a violation for the Respondent to provide promotional items to retailers for less than the wholesale cost of those items. The Respondent violated that section when it, through its employee or agent, provided ice buckets free of charge to Buckets Bar.

TABC may suspend or cancel a permit or license if a permittee or licensee is found to have violated a provision of the Code or a rule adopted by TABC. TEX. ALCO. BEV. CODE ANN. §§6.01(b) and 11.61(b)(2). The preponderance of the evidence indicates the Respondent violated Section 102.15 of the Code and Section 45.113 of the rules of TABC.

The Staff recommended the Respondent be assessed a three day suspension of its licenses and permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

#### **B. Recommendation**

The undersigned ALJ agrees with the Staff and recommends the Respondent be assessed a three day suspension of its licenses or permits or, in lieu of the suspension, a forfeiture of \$2,250.00.

#### **IV. PROPOSED FINDINGS OF FACT**

1. Williams Wholesalers, Inc. d/b/a Williams Wholesalers, Inc. (the Respondent) holds a General Distributor's License, an Importer's License, a General Class B Wholesaler's Permit, and a Private Carrier's Permit issued by the Texas Alcoholic Beverage Commission (TABC).
2. On June 10, 1999, the Respondent's employee or agent, Greg Salvo, provided ice buckets, free of charge, to one of the Respondent's customers, a retail establishment, Buckets Bar.
3. The ice buckets identified in Finding of Fact No. 2 were promotional items that were to be used when delivering beer to customers of Buckets Bar.
4. The wholesale cost of the ice buckets identified in Finding of Fact No. 2 was \$0.91 each.
5. On June 10, 1999, Greg Salvo held a license or permit issued by TABC.
6. TABC took disciplinary action against Greg Salvo for providing ice buckets free of charge to Buckets Bar and Greg Salvo paid a monetary forfeiture as a result of that disciplinary action.

On March 8, 2000, notice of the hearing to consider sanctions against the Respondent was sent by certified mail, return receipt requested, to the Respondent at its address of record, 601 North 19<sup>th</sup> Street, Corpus Christi, Texas.

8. The Respondent or its agent received the notice of hearing.

9. The hearing to consider the allegations convened on June 8, 2000, before Administrative Law Judge Edel P. Ruiseco with the State Office of Administrative Hearings (SOAH) in SOAH offices at 1225 North Agnes, Corpus Christi, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent was represented by its president, William R. Durrill.

### PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§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. GOV'T. CODE ANN. §§2003.021(b) and 2003.042(5).
3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Findings of Fact Nos. 2-6, the Respondent provided promotional items, things of value, to a retailer without charging the retailer for the promotional items in violation of TEX. ALCO BEV. CODE ANN. 102.15 and 16 TEX. ADMIN. CODE §45.113.
5. Based on the foregoing findings of fact and conclusions of law, TABC is warranted in suspending the Respondent's licenses and permits for a period of three days, or in lieu of such suspension, assessing the Respondent a monetary penalty of \$750.00 per day for the total amount of \$2,250.00. TEX. ALCO. BEV. CODE ANN. §§6.01(b), 11.61(b)(2), and 61.74(a)(1).

SIGNED this 2<sup>nd</sup> day of October, 2000

*for*   
\_\_\_\_\_  
EARL A. CORBITT  
Administrative Law Judge  
State Office of Administrative Hearings