

DOCKET NO. 592869

IN RE HUMMINGBIRD INTERNATIONAL	§	BEFORE THE
HOLDING COMPANY INC.	§	
D/B/A FONDREN MINI MART	§	
PERMIT NO. BQ450451	§	TEXAS ALCOHOLIC
	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-0089)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 7th day of January, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Don Smith. The hearing convened on November 28, 2001, and adjourned November 28, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 30, 2001. 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 **Permit No. BQ450451** is herein **SUSPENDED**.

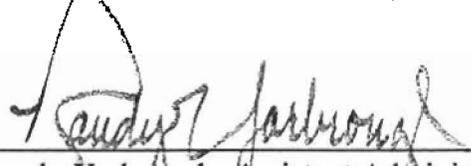
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,500.00** on or before the **27th day of February, 2002**, all rights and privileges under the above described permit will be **SUSPENDED** for a period of **ten (10) days, beginning at 12:01 A.M. on the 6th day of March, 2002**.

This Order will become final and enforceable on JANUARY 28, 2002, 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 7th day of January, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Don Smith
Administrative Law Judge
State Office of Administrative Hearings
Houston, Texas
VIA FACSIMILE (713) 812-1001

Hummingbird International Holding Company Inc.
RESPONDENT
d/b/a Fondren Mini Mart
12260 Fondren
Houston, Tx. 77035
CERTIFIED MAIL NO. 7000 1530 0003 1929 0958

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Compliance Division
Licensing Division
Houston District Office

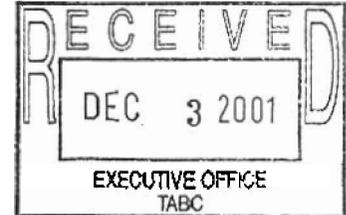
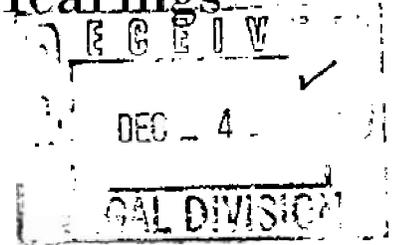
State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 30, 2001

Mr. Rolando Garza, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78731



VIA REGULAR MAIL

RE: Docket No. 458-02-0089; TABC vs. Hummingbird International Holding Company Inc. d/b/a Fondren Mini Mart; Permit No. BQ450451

Dear Mr. Garza:

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 Gayle Gordon, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Hummingbird International Holding Company Inc. d/b/a Fondren Mini Mart, (Respondent). For reasons discussed in the Proposal for Decision, this proposal recommends that Respondent's license be suspended for a period of 10 days or that Permittee be allowed to pay a fine of \$1,500.00 in lieu of suspension.

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,

A handwritten signature in black ink that reads "Don Smith".

Don Smith
Administrative Law Judge

DS\mc
Enclosure

xc: **Gayle Gordon, Staff Attorney, TABC - VIA FACSIMILE**
Hummingbird International Holding Co. Inc. d/b/a Fondren Mini Mart, 12260 Fondren, Houston, Texas 77093
VIA REGULAR MAIL

DOCKET NO. 458-02-0089

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE
	§	
	§	
V.S.	§	
	§	OFFICE OF
HUMMINGBIRD INTERNATIONAL HOLDING COMPANY INC. D/B/A FONDREN MINI MART PERMIT NO. BQ450451 HARRIS COUNTY, TEXAS (TABC CASE NO. 592869)	§	
	§	
	§	
	§	
	§	
	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Hummingbird International Holding Company Inc. d/b/a Fondren Mini Mart (the Permittee) for an offense committed in violation of TEX. ALCO. BEV. CODE ANN. §61.73(b) and §102.31. TABC alleged that Permittee made a payment for beer in its original containers and packages with a dishonored check in violation of Section 61.73(b) and §102.31 of the code. The violation occurred on or about October 3, 2000, when Permittee, its agent, servant, or employee gave checks or drafts for the purchase of beer that were dishonored when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. §61.73(b) and §102.31.

The Permittee did not make an appearance at the hearing on November 28, 2001. This Proposal for Decision finds the allegations by the TABC to be proven and adopts the recommendation of the staff that the license be suspended for a period of 10 days or that Permittee be allowed to pay a fine of \$1,500.00 in lieu of suspension.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened on November 28, 2001, at the offices of the State Office of Administrative Hearings in Houston, Harris County, Texas. The staff of the Commission (Staff) was represented by its counsel, Gayle Gordon and Wendy To. Because the hearing proceeded on a default basis and Staff's factual allegations are deemed admitted as true, the ALJ has incorporated those allegations into the findings of fact without further discussion.

The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. EVIDENCE AND APPLICABLE STATUTORY PROVISIONS

TEX. ALCO. BEV. CODE ANN. §61.73(b) authorizes the Commission to cancel or suspend a license for not more than 60 days if it is found, after notice and hearing, that the Permittee gave a distributor a check for payment which is dishonored when presented for payments. As described in the

Findings of Fact, the Permittee violated TEX. ALCO. BEV. CODE ANN. §61.73(b) by writing a check to a distributor that was subsequently returned for insufficient funds.

The staff attorney introduced two exhibits into evidence:

Exhibit TABC 1 is an affidavit of Brian L. Guenther, Licensing Department Director, that the Permit No. BQ450451 was issued to Hummingbird International Holding Company Inc., doing business as Fondren Mini Mart, by the Texas Alcoholic Beverage Commission. The mailing address of Hummingbird International Holding Company Inc. is 12260 Fondren, Houston, Texas 77035. Attached to the affidavit is the permit and violation history.

Exhibit TABC 2 is the Notice of Hearing mailed to Hummingbird International Holding Company Inc. on November 7, 2001 and returned as undeliverable as addressed and unable to forward.

The ALJ took judicial notice of the Court's file which shows the hearing was scheduled for November 28, 2001 in the Notice of Hearing. Notice was properly served on November 7, 2001. The Hearing convened on November 28, 2001, and Permittee did not appear.

III. RECOMMENDATION

The Notice of Hearing, in bold lettering, states "**if you fail to appear at the hearing, the allegations in the notice will be deemed admitted as true, and the relief sought may be granted by default.**" TABC rules authorize service of the notice of hearing by sending it to the party's last known address as shown by the agency's records, and there is credible evidence that the notice of hearing was sent by certified or registered mail, return receipt requested, to Permittee's last known address, as shown by the agency's records. Therefore, the allegations that Permittee made payment for beer in its original containers and packages with a dishonored check in violation of Section 61.73(b) and Section 102.31 of the code is admitted as true. The relief sought should be granted, and the license should be suspended for a period of ten days, or in lieu of suspension, Permittee should pay a fine of 1,500.00.

IV. FINDINGS OF FACT

1. Permit No. BQ450451 was issued to Hummingbird International Holding Company Inc., doing business as Fondren Mini Mart, by the Texas Alcoholic Beverage Commission. The mailing address of Andy's Bar-B-Que is 12260 Fondren, Houston, Texas 77035.
2. The staff sent a Notice of Hearing regarding the violation of the Texas Alcoholic Beverage Code to the Permittee by certified or registered mail, return receipt requested, and mailed the notice to Permittee's last known address as shown in the agency's records.
3. The hearing on the merits was held on November 28, 2001, at the offices of the State Office of Administrative Hearings, Houston, Harris County, Texas. Staff was represented by its counsel, Gayle Gordon and Wendy To. The Permittee did not appear and was not represented at the hearing.
4. The hearing proceeded on a default basis, and the factual allegations were deemed

admitted as follows:

Permittee made payment for beer in its original containers and packages with a dishonored check in violation of Section 61.73(b) and §102.31 of the code. The violation occurred on or about October 3, 2000, when Permittee, its agent, servant, or employee gave a check or draft for the purchase of beer that was dishonored when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. §61.73(b) and §102.31.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 61.71.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative 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 ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Notice of the hearing was sufficient to allow entry of default judgment under State Office of Administrative Hearings Rules, 1 Tex. Admin. Code §155.55.
5. Permittee violated TEX. ALCO. BEV. CODE ANN. §61.73(b) and §102.31 by making payment for beer in its original containers and packages with a dishonored check in violation of Section 61.73(b) and Section 102.31.
6. Based on the foregoing Findings of Fact and Conclusions of Law, a ten day suspension of the permit and license is warranted. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Permittee should be allowed to pay a \$1,500.00 civil penalty in lieu of suspension of its permits and licenses.

SIGNED this 30 day of November, 2001.



DON SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS