DOCKET NO. 604216

IN RE CAROL THERESA HADI	§	BEFORE THE
D/B/A CAROL'S GROCERY	§	
	§	
PERMIT NO. BQ-320413	§	TEXAS ALCOHOLIC
	§	
BLANCO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-1598)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of April, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Barbara C. Marquardt. The hearing convened on January 22, 2004, and adjourned the same day. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 19, 2004. 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 Wine and Beer Retailer's Off-Premise Permit is hereby **SUSPENDED.**

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **$1,050.00** on or before the 23rd day of **June, 2004**, all rights and privileges under the above described permit will be **SUSPENDED for a period of seven (7) days, beginning at 12:01 A.M. on the 30th day of June, 2004.**

This Order will become final and enforceable on May ~~8~~ 17th, 2004, 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 ~~15th~~ 26th day of April, 2004.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Carol Theresa Hadi
Carol's Grocery
RESPONDENT
P. O. Box 91795
Austin, Texas 78709
CERTIFIED MAIL NO. 7001 2510 0007 0098 4581
RETURN RECEIPT REQUESTED

Administrative Law Judge
State Office of Administrative Hearings
Austin , Texas
VIA FACSIMILE: (512) 475-4994

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Austin District Office
Licensing Division

7001 2510 0007 0098 4581

CERTIFIED MAIL RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

OFFICIAL USE

Postage $
Certified Fee
Return Receipt Fee (Endorsement Required)
Restricted Delivery Fee (Endorsement Required)
Total Postage & Fees $ 6.04 2.16

Postmark Here

Sent To Carol Theresa Hadi
Street, Apt. No.; or PO Box No.
City, State, ZIP+4 Austin
4-15-04

PS Form 3800, January 2001 See Reverse for Instructions

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 604216 **REGISTER NUMBER:**

NAME: Carol Theresa Hadi **TRADENAME: Carol's Grocery**

ADDRESS: 112 Hwy. 281/290 South, Johnson City, Texas 78636

DATE DUE: June 23, 2004

PERMITS OR LICENSES: BQ-320413

AMOUNT OF PENALTY: $1,050.00

Amount remitted $_____ Date remitted _____

If you wish to a pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 23RD DAY OF JUNE, 2004, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

For Overnight Delivery: 5806 Mesa Drive, Austin, Texas, 78731

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

_____
Signature of Responsible Party

_____
Street Address P.O. Box No.

_____
City State Zip Code

_____
Area Code/Telephone No.

DOCKET NO. 458-04-1598

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
V.	§	OF
	§	
CAROL THERESA HADI, d/b/a	§	
CAROL'S GROCERY	§	
PERMIT NO. BQ-320413	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

This is an enforcement action brought by the Texas Alcoholic Beverage Commission (TABC) against Carol Theresa Hadi, d/b/a Carol's Grocery (Respondent), for displaying or possessing graphic material that was immoral, indecent, lewd, or profane. The Administrative Law Judge (ALJ) finds that TABC proved its case and recommends that Respondent's permit be suspended for seven days, or that it be permitted to pay a civil penalty in lieu of the suspension of $1,050.

I. PROCEDURAL HISTORY

On January 22, 2004, the hearing was held on the 4th floor of the William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Dewey A. Brackin, attorney, appeared and represented TABC. Respondent appeared *pro se*. The record closed on the same day.

II. DISCUSSION

ISSUE: Did Respondent display or possess graphic material that was immoral, indecent, lewd, or profane on its premises on February 20, 2003, thereby violating TEX. ALCO. BEV. CODE ANN. §§11.61(b)(7) and 101.64, and 16 TEX. ADMIN. CODE §35.31(c)(12) ?

Legal Standard & TABC Policy

TABC rules provide that a licensee or permittee violates the Alcoholic Beverage Code if any public indecency offense described in Chapter 43 of the Texas Penal Code is committed on the premises.[1] The obscenity statute provides, in pertinent part, as follows:

> (1) "Obscene" means material or a performance that:
>
> (A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
>
> (B) depicts or describes: (i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or (ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and
>
> © taken as a whole, lacks serious literary, artistic, political, and scientific value.
>
> (2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.
>
> (4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.[2]

The Texas Alcoholic Beverage Code prohibits licensees from possessing or displaying on the licensed premises a card, calendar, placard, picture, or handbill that is immoral, indecent, lewd, or profane. Further, they provide for suspension for not more than 60 days or cancellation of a permit if it is found that the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.[3]

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[1] 16 TEX. ADMIN. CODE § 35.31(c)(12).

[2] TEX. PENAL CODE ANN. §43.21(a). (Emphasis added.)

[3] TEX. ALCO. BEV. CODE ANN. §§ 101.64. and 11.61(b)(7).

Lou Bright, the TABC General Counsel, issued a memo concerning enforcement actions regarding obscene materials dated November 8, 2001, to Lt. David Ferrero, Austin Enforcement District.[4] The memo stated that pictures of people engaging in sexual activity and showing contact or penetration presented sufficient evidence of obscenity to warrant enforcement. Further, it stated that TABC would need to prove the licensee was aware of the nature of the contents of the material, suggesting that the first time such material was found a warning describing the elements of the offense would be issued. The second time obscene material was found, administrative charges would be brought.[5]

Evidence

TABC's Case

Respondent's store is located in Johnson City, Blanco County, Texas. TABC Agent Jon Robinson wrote an offense report that included these facts:

- On February 8, 2002, the prior TABC Agent in the area, Jimmy Poole, had issued an administrative warning to the store for displaying obscene magazines, explaining the magazines would have to be removed, or an enforcement action would be brought against the store.
- On October 2, 2002, TABC Agent Robinson purchased a *Hustler* magazine at the store that contained obscene pictures. He issued an administrative warning to the store, explaining such magazines would have to be removed, or an enforcement action would be brought against the store.
- On December 6, 2002, Agent Robinson went to the store and found a number of magazines that had pictures similar to those in the *Hustler* magazine he had purchased in October. He spoke to Carol Hadi, who explained that her husband had telephoned TABC's Austin headquarters in October and was informed that as long as nothing "obscene" was displayed

[4] Respondent's store is in Johnson City, which is within the Austin Enforcement District.

[5] TABC Ex. 4.

on the magazine covers, and they were sealed in plastic wrappings, there was no violation. Agent Robinson testified that he told Ms. Hadi that was not TABC policy and warned her to stop displaying the magazines.

- On December 10, 2002, Ms. Hadi's husband, Hosein Hadifar, spoke to Agent Robinson by telephone and requested a list of all magazines that contained obscene photographs. Agent Robinson told him there was no such list, but he named the magazines he was aware of that contained obscene photographs. Mr. Hadifar told Agent Robinson that those items were very good sellers that generated a good income for the store.

On February 5, 2003, Agent Robinson went to the store and purchased a copy of the April 2003 issue of *Hustler* magazine, which contained obscene photographs.

On February 20, 2003, Agent Robinson went to Carol's Grocery and seized the July 2001 edition of *High Society* magazine. When he found that it contained obscene photographs, he issued the store an administrative notice indicating he would be filing this case against the store.

Agent Robinson testified that the magazines he viewed at the store beginning in October 2002 and through February 20, 2003, depicted oral, anal and vaginal sex acts that were patently offensive to the community standards of decency in Johnson City. He also testified that the memo from the TABC General Counsel explaining enforcement of the obscenity statutes was sent across the state and described the standard for all localities in Texas.

The Defense

Mr. Hadifar testified that after his telephone conversation with Agent Robinson in December, he spoke to the magazine distributor for the Austin and San Antonio area (which includes Johnson City). He asked the distributor not to bring questionable magazines to his store. He explained that he did not want to open and examine the magazines one-by-one. At that point, he reduced their stock and had one shelf on which they displayed "normal" magazines, like *Playboy*. Apparently, after the February incident, the store stopped selling any magazines at all.

Ms. Hadi questioned the authenticity of the exhibits. First, the magazine Agent Robinson seized on February 20 was an issue dated in 2001. She testified that was not possible, because the magazine distributor changed out old magazines for new magazines monthly. On cross examination, Ms. Hadi admitted that up until about a year before the incident in this case, the store sold three-packs of this type of magazine, and three-packs contained old magazine issues. However, she testified that could not have been the case on February 20, because she saw Agent Robinson take a single magazine, although she did not remember what particular magazine he took. As to the April 2003 issue Agent Robinson bought on February 5, she reiterated her husband's testimony – they stopped selling all magazines at the end of February.

In conclusion, Ms. Hadi testified she and her husband respect the laws of Texas and intend to follow TABC regulations. Ms. Hadi introduced a letter of commendation the store had received in 1996 into evidence. The letter indicated that TABC conducted a sting operation at the store and felt the store's employees were conscientious in asking for identification from a minor and then firmly denying the sale of alcohol to the minor.[6] She felt if TABC had issued them a list of forbidden magazines, this incident would not have occurred.

Discussion & Recommendation

Staff proved its case by a preponderance of the evidence. While the dates of the two magazines in evidence do not seem particularly logical, Respondent admitted carrying such magazines. Neither Mr. Hadifar nor Ms. Hadi were present for the purchase of the magazine on February 5, and Ms. Hadi could not remember what exact magazine Agent Robinson seized on February 20. The ALJ concludes that the magazines were dated as Agent Robinson described them; apparently, the 2001 issue came from a three-pack, and the April 2003 issue was available for sale at the store in February of 2003.

The store had received ample warnings from TABC about the potential of an enforcement action for possessing or displaying obscene materials. The magazines in evidence do, in fact, depict

[6] Respondent's Ex. 1.

ultimate sexual acts, and Agent Robinson testified that they were offensive to current community standards of decency.

As far as punishment, Respondent has been commended in the past for its operation as far as policing sales of alcohol to minors, and this is a first offense. Furthermore, the store does not carry magazines anymore, so it is unlikely that it will violate the obscenity statute in the future. For those reasons, the ALJ recommends that Respondent's permit be suspended for seven days, and that Respondent be offered the option of paying a civil penalty of $150 per day in lieu of the suspension.

III. FINDINGS OF FACT

1. Carol Theresa Hadi, d/b/a Carol's Grocery (store), which holds Permit No. BQ-320413 issued by the Texas Alcoholic Beverage Commission (TABC), is located in Johnson City, Texas.

2. On October 2, 2002, the store displayed for sale a *Hustler* magazine that contained pictures of people engaging in sexual activity and showing contact or penetration, and TABC issued an administrative warning to the store, explaining that such magazines would have to be removed, or an enforcement action would be brought against the store.

3. On December 6, 2002, a TABC agent went to the store and found a number of magazines for sale that had pictures similar to those in the *Hustler* magazine referenced in Finding 2. The store was verbally warned to stop displaying such magazines.

4. On February 5, 2003, a TABC agent went to the store and purchased a copy of the April 2003 issue of *Hustler* magazine, which contained pictures similar to those referenced in Findings 2 and 3.

5. On February 20, 2003, a TABC agent went to the store and seized a copy of the July 2001 edition of *High Society* magazine, which contained pictures similar to those referenced in Findings 2 – 4.

6. The magazines referenced in Findings 2 – 5 were patently offensive to the community standards of decency in Johnson City.

7. After February 2003, the store stopped selling any magazines at all.

8. The store has never before violated the rules and regulations enforced by TABC. In fact, in 1996 TABC commended it because its employees were conscientious in asking for identification from a minor and then firmly refusing to sell alcohol to the minor.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this case. TEX. ALCO. BEV. CODE ANN. §6.01.

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. TEX. GOV'T CODE ANN. §§2003.021(b) and 2003.042(5).

3. The store received proper notice of the hearing. TEX. GOV'T CODE ANN. §2001.051.

4. As referenced in the Findings, the store violated TEX. ALCO. BEV. CODE ANN. §§11.61(b)(7) and 101.64 by possessing and displaying magazines that were obscene, as defined in TEX. PENAL CODE ANN. §43.21(a); 16 TEX. ADMIN. CODE § 35.31(c)(12).

5. Based on the foregoing, the store's Permit No. BQ-320413 should be suspended for seven days. TEX. ALCO. BEV. CODE ANN. §§ 101.64. and 11.61(b)(7). Alternatively, the store should be permitted to pay a civil penalty of $150 per day of suspension, or $1,050, in lieu of the suspension. TEX. ALCO. BEV. CODE §11.64(a).

SIGNED this 19th day of March, 2004.

Barbara C. Marquardt

BARBARA C. MARQUARDT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS