

DOCKET NO. 593129

IN RE CHARLIE/HOWARD INC.
D/B/A JOE'S/THE BRICK
PERMIT NOS. MB228122, LB228123

DALLAS COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-0949)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of February 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert F. Jones, Jr. The hearing convened and adjourned on January 11, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 25, 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 Permit Nos. MB228122 and LB228123 are hereby **SUSPENDED** for seven (7) days.

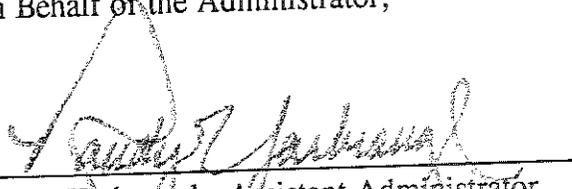
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$1,050.00** on or before the **17th day of April 2002**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of seven (7) days, beginning at **12:01 A.M.** on the **24th day of April 2002**.

This Order will become final and enforceable on March 8, 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 15th day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Robert F. Jones, Jr.
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (817) 377-3706

Robert Wright
ATTORNEY FOR RESPONDENT
VIA FACSIMILE (214) 521-3978

Charlie/Howard Inc.
d/b/a Joe's/The Brick
RESPONDENT
4117 Maple
Dallas, Texas 75219-3219
CERTIFIED MAIL/RRR NO. 7001 0320 0003 0147 5315

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Dallas District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE**

DOCKET NUMBER: 593129

REGISTER NUMBER:

NAME: CHARLIE/HOWARD INC.

TRADENAME: JOE'S/THE BRICK

ADDRESS: 4117 Maple, Dallas, Texas 75219-3219

DATE DUE: April 17, 2002

PERMITS OR LICENSES: MB228122, LB228123

AMOUNT OF PENALTY: \$1,050.00

Amount remitted \$ _____ Date remitted _____

If you wish to 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 17TH, DAY OF APRIL, 2002, 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**

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. 458-02-0949

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

CHARLIE/HOWARD INC.
D/B/A JOE'S/THE BRICK
DALLAS COUNTY, TEXAS
(TABC CASE NO. 593129)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought suspension of Charlie/Howard Inc. d/b/a Joe's/The Brick's (Respondent) permits, or in the alternative payment of a penalty. The Staff alleged Respondent had paid for beer with checks which were dishonored. This proposal finds that the allegations against Respondent are true. The Administrative Law Judge (ALJ) recommends Respondent's permits be suspended seven days, or in the alternative Respondent pay a penalty of \$1,050.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of notice or jurisdiction in this proceeding. Those matters are set out in the findings of fact and conclusions of law without further discussion here.

On January 11, 2002, a hearing convened before ALJ Robert F. Jones Jr., State Office of Administrative Hearings (SOAH). The Texas Alcoholic Beverage Commission (TABC) was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared through Robert Wright as its attorney, and Howard H. Okon, its President. Evidence was received and the record was closed on January 11, 2002.

Staff alleged that (1) Respondent had been issued permits, (2) gave checks as payment for beer, and (3) those checks were dishonored when presented for payment.

II. EVIDENCE

A. Staff's Evidence

Respondent's licensed premise is located at 4117 Maple, Dallas, Dallas County, Texas. TABC issued mixed beverage permit MB 228122 and mixed beverage late hours permit LB 228123 to Respondent.

On November 27, 2001, Staff served Respondent with Requests for Admissions (the Requests), a copy of which (along with proof of service) was admitted in evidence. Respondent failed to either admit or deny the Requests. The Requests are deemed admitted, and are conclusively

established against Respondent. 1 TEX. ADMIN. CODE §§ 155.31(d)(2). Those matters admitted are set out in the findings of fact and conclusions of law without further discussion here. Copies of the checks in question were also admitted into evidence.

B. Respondent's Evidence

Mr. Okon testified that although Respondent's had a \$5,000 line of credit available to pay its checks at all relevant times, the checks were dishonored by the drawee bank as a result of the bank's error. Affidavits from Carmen Carrell, Respondent's banker, to that effect were admitted in evidence. The exact reason each check was dishonored was not clear. Apparently Ms. Carrell had to approve each draw on the line of credit and was not always available. Mr. Okon testified the checks were satisfied by cash transfers to the payees.

III. DISCUSSION

TABC is authorized to suspend a permit for not more than 60 days for any violation of the Code. TEX. ALCO. BEV. CODE § 11.61(b)(2)(Vernon 2000) (the Code). A permittee violates the code if it gives checks as payment for beer and the checks are dishonored when presented for payment. §61.73(b) of the Code. The facts deemed admitted establish Respondent's violation of §61.73(b).

The Staff recommended a suspension of Respondent's permits for seven days, or in the alternative that Respondent pay a penalty of \$1,050. Mr. Okon responded that he had demonstrated the dishonor was not Respondent's fault and that a penalty of \$1,050 was excessive. The Staff noted that §61.73(b) of the Code is a "strict liability" statute, and that Respondent's excuse for the checks being dishonored was no defense to its liability. Respondent's violation history was admitted into evidence. The record shows that Respondent has four prior cash law violations during the years 1995 to 1999. Respondent admitted to seven cash law violations between August 21, 2000, and July 25, 2001, which are the subject of this case.

Under the TABC's "standard penalty chart" a violation of §61.73(b) of the Code calls for a maximum of a three-day suspension for a first violation, a five to ten day suspension for a second violation, and 10 to 15 days for a third violation. See 16 TEX. ADMIN. CODE § 37.60. These violations are "major regulatory violations" under the penalty chart. Generally, a "repeat violation" justifies the penalty for a second or third violation if . . . it is a major regulatory violation within 24 months of the first violation." *Id.* § 37.60(c). A penalty for a repeat violation is not "assessed unless the alleged violation occurs after the permittee . . . has been notified, in writing, of the first alleged violation." *Id.* § 37.60(d). The amount of the civil penalty may not be less than \$150 or more than \$25,000 for each day the permit or license was to have been suspended. § 11.64(a) of the Code. The standard penalty chart is not binding. The facts developed in the record are the determining factors "as to the sufficiency of the penalty assessed." 16 TEX. ADMIN. CODE § 37.60(g).

The Staff indicated that it would have initially recommended a 10 day suspension, or a penalty of \$1,500, but after considering the evidence recommended the lower sanctions of seven days or \$1,050. There is no evidence of when Respondent was notified in writing of each violation. Assuming that no such notice was given, Respondent could still be assessed a "first-violation"

penalty for each violation, considered separately. Treating the two October 23, 2000, checks (one each to Ben E. Keith Co. and Miller of Dallas Inc.) as one separate incident, and the two July 25, 2001, checks (one each to Ben E. Keith Co. and Miller of Dallas Inc.) as another separate incident, and the August 21, 2000, September 27, 2000, and May 24, 2001, checks as three more separate incidents, Respondent could be suspended up to three days, or pay a fine of \$450 for each. Assuming that prompt notice was given by the Staff for each instance, Respondent could be:

- Suspended up to three days, or pay a fine of \$450 for the August 21, 2000, check;
- Suspended up to 10 days, or pay a fine of \$1,500 for the September 27, 2000, check;
- Suspended up to 15 days, or pay a fine of \$2,250 for the two October 23, 2000, checks;
- Suspended up to 15 days, or pay a fine of \$2,250 for the May 24, 2001, check; and
- Suspended up to 15 days, or pay a fine of \$2,250 for the two July 25, 2001, checks.

The Sanction recommended by the Staff is reasonable and within the authority of the penalty chart. 16 TEX. ADMIN. CODE § 37.60.

The ALJ recommends Respondent's permits be suspended for seven days, or in the alternative that Respondent pay a penalty of \$1,050.

IV. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued mixed beverage permit MB 228122 and mixed beverage late hours permit LB 228123 to Charlie/Howard Inc. d/b/a Joe's/The Brick (Respondent).
2. Respondent's licensed premise is located at 4117 Maple, Dallas, Dallas County, Texas.
3. On August 21, 2000, Respondent gave Ben E. Keith Co. a check as payment for beer and the check was dishonored when presented for payment.
4. On September 27, 2000, Respondent gave Miller of Dallas Inc. a check as payment for beer and the check was dishonored when presented for payment.
5. On October 23, 2000, Respondent gave Ben E. Keith Co. a check as payment for beer and the check was dishonored when presented for payment.
6. On October 23, 2000, Respondent gave Miller of Dallas Inc. a check as payment for beer and the check was dishonored when presented for payment.
7. On May 24, 2001, Respondent gave Ben E. Keith Co. a check as payment for beer and the

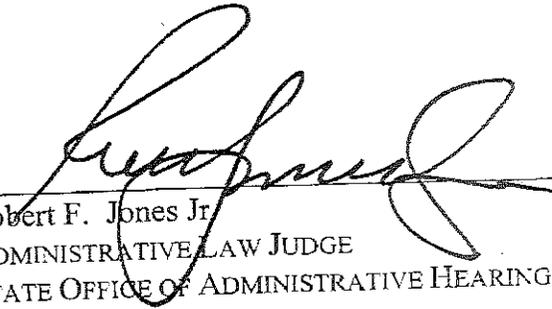
- check was dishonored when presented for payment.
8. On July 25, 2001, Respondent gave Ben E. Keith Co. a check as payment for beer and the check was dishonored when presented for payment.
 9. On July 25, 2001, Respondent gave Miller of Dallas Inc. a check as payment for beer and the check was dishonored when presented for payment.
 10. On November 27, 2001, the Staff served its Notice of Hearing (the NOH) on Respondent by certified mail.
 11. The NOH alleged Respondent had violated the Code in several specified instances. It informed the Respondent the hearing would be held on January 11, 2002, at 10:30 a.m. at 6333 Forest Park Road, Suite 150-A, Dallas, Dallas County, Texas. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
 12. On January 11, 2002, a hearing convened before Administrative Law Judge Robert F. Jones Jr., State Office of Administrative Hearings SOAH. TABC was represented at the hearing by Timothy E. Griffith, TABC Staff Attorney. Respondent appeared through Robert Wright as its attorney, and Howard H. Okon, its President. Evidence was received, and the record was closed on January 11, 2002.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. § 11.11(b)(2) (Vernon 2000)(the Code).
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §2003.021 (Vernon 2000).
3. Respondent received notice of the proceedings and hearing, pursuant to TEX. GOV'T CODE § 2001.051, and 1 TEX. ADMIN. CODE §§ 155.25(d)(3) and 155.27.
4. Based on Findings of Fact Nos. 3 - 9, Respondent has violated §61.73(b) of the Code.

5. Based on the foregoing findings and conclusions, Respondent's permits should be suspended for seven days, or in the alternative Respondent should pay a penalty of \$1,050.

SIGNED January 25, 2002.



Robert F. Jones Jr.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS