

DOCKET NO. 594011

IN RE DOLORES S. BRITO
D/B/A FIESTA CLUB
PERMIT NO. BG408313
LICENSE NO. BL408314

BEXAR COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-0029)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

AMENDED ORDER

This order is amended to reflect the correct permit and license number as shown in paragraph 5 below.

CAME ON FOR CONSIDERATION this 14th day of February, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Leah Davis Bates. The hearing convened on October 30, 2001, and adjourned October 30, 2001. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 31st, 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. BG408313 and License No. BL408314** are herein **SUSPENDED**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$450.00** on or before the **20th day of March, 2002**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of three (3) days, beginning at **12:01 A.M. on the 27th day of March, 2002**.

This Order will become final and enforceable on February 18, 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 14th day of February, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Leah Davis Bates
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (210) 308-6854

Dolores S. Brito
RESPONDENT
d/b/a Fiesta Club
123 Wake Forrest
San Antonio, Texas 78228
CERTIFIED MAIL NO. 7000 1530 0003 1929 1337
& VIA REGULAR MAIL

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

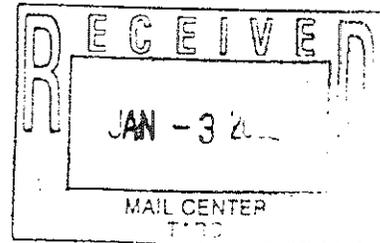
Compliance Division
Licensing Division
San Antonio District Office

State Office of Administrative Hearings

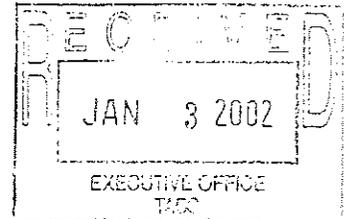
JAN 3 2002



Shelia Bailey Taylor
Chief Administrative Law Judge



January 2, 2002



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

RE: Docket No. 458-02-0029; Texas Alcoholic Beverage Commission vs.
Dolores S. Brito, d/b/s Fiesta Club, TABC Case No. 594011

Dear Mr. Garza:

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 Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, and to Dolores S. Brito, d/b/a Fiesta Club. For reasons discussed in the proposal, I recommend that Respondent's license and permit be suspended for 3 days and that the Respondent be allowed to pay \$450.00 per day in lieu of suspension of its permits.

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,

Leah Davis Bates
Administrative Law Judge

LDB:msw
Enclosure

xc: Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission -
Facsimile 512-206-3498
Dolores S. Brito, d/b/a Fiesta Club, 123 Wake Forrest,
San Antonio, Tx 78228

DOCKET NO. 458-02-0029

TEXAS ALCOHOLIC
BEVERAGE COMMISSION

V.

DOLORES S. BRITO
D/B/A FIESTA CLUB
PERMIT NOS. BG-408313 & BL-408314
BEXAR COUNTY, TEXAS
(TABC CASE NO. 594011)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (Staff) brought this enforcement action against Dolores Brito, d/b/a Fiesta Club (the Permittee) for paying for beer with a check for which funds were insufficient. The Permittee appeared at the hearing and represented herself. The Staff recommended that Permittee's permits be suspended for ten days or that Permittee pay a fine of \$1,500.00 in lieu of suspension.

I. Procedural History, Notice, and Jurisdiction

The hearing in this matter convened on October 30, 2001, before ALJ Leah Davis Bates, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Staff was represented by Gayle Gordon, Assistant Attorney General. The Permittee appeared and represented herself at the hearing.

The Texas Alcoholic Beverage Commission (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 an enforcement action and the notice 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. The Allegations and Applicable Statutory Provisions

The allegations in this proceeding asserted the Permittee, its agent, or employee paid beer distributors for beer with checks on both February 9, 2001 and February 24, 2001, that were subsequently returned for insufficient funds. It is a violation of TEX. ALCO. BEV. CODE ANN. (the Code) § 61.73(b) for a permittee to tender a beer distributor a check for payment of beer which is dishonored when presented for payment. Such a violation

III. Summary of the Evidence

TABC introduced sufficient and undisputed evidence of the dishonored checks written to Halo Distributing Company and accompanying affidavits. Ms. Brito did not dispute the evidence, but testified that the Bank made an error on both occasions.

Ms. Brito testified that when she received notice of the first dishonored check of February 9, 2001, she had made a cash deposit at the bank and they had failed to note the deposit. She eventually had to go back to the bank with proof of her deposit to remedy the situation. She further stated, that after that incident, she believed she had set up an overdraft account, so that this would not occur again. The bank's failure to properly set up the overdraft account was the reason the second check was dishonored.

IV. Recommendation

Penalties for the violations of the Code § 61.73(b) may be determined in accordance with the Commission's standard penalty chart found at 16 TEX. ADMIN. CODE § 37.60. The penalty chart prescribes suspensions of varying lengths, depending on a permittee's history of violations.

Ms. Brito in no way contested the fact that on two separate occasions checks were dishonored. Ms. Brito's testimony established that Bank of America failed to credit a cash deposit to her account. The bank's error resulted in the February 9, 2001, check being dishonored. The February 24, 2001 check was insufficient based on Ms. Brito's mistake, not the banks. The fact that Ms. Brito believed she had set up an account with overdraft protection is not an affirmative defense. Ms. Brito's statements, although credible, amount to an admission that she made a mistake regarding the existence of an overdraft account, not that Bank of America made the mistake.

In this case, Staff recommended a ten-day suspension based a prior cash law violation and that the present Notice of Hearing alleges two separate instances of cash law violations; The ALJ believes that Ms. Brito has an affirmative defense to the February 9, 2001 allegations, but not as to the February 24, 2001 check. The ALJ therefore recommends a three-day suspension. Pursuant to the Code § 11.64, the Permittee must be offered the opportunity to pay a civil penalty in lieu of a suspension. The penalty may not be less than \$150.00 nor more than \$25,000.00 for each day of the suspension. Staff recommended the minimum amount be used to determine the civil penalty.

V. Findings of Fact

1. Dolores Brito d/b/a Fiesta Club (the Permittee), located at 1110-12 Pleasanton, San Antonio, Bexar County, Texas 78214, holds Permit Nos. BG-408313 and BL-408314.
2. Permittee received proper and timely notice of the hearing from the staff of the Texas Alcoholic Beverage Commission (Staff) in a notice of hearing, dated October

1, 2001. The notice was properly sent to Permittee at the address provided in Finding of Fact No. 1.

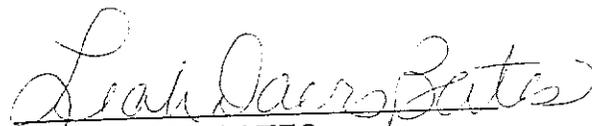
3. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
4. The hearing was convened on October 30, 2001, at 9:00 a.m. at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Permittee represented herself at the hearing. Gayle Gordon, Assistant Attorney General, represented the Staff.
5. On or about February 9, 2001, Permittee, its agent, servant, or employee tendered a check written in the amount of \$163.00 to Halo Distributing Company, of San Antonio, Texas. On or about February 21, 2001, the check was returned by Drawee, Bank of America, of San Antonio, Texas for insufficient funds.
6. On or about February 24, 2001, Permittee, its agent, servant, or employee tendered a check written in the amount of \$184.40 to Halo Distributing Company, of San Antonio, Texas. On or about March 2, 2001, the check was returned by Drawee, Bank of America, of San Antonio, Texas for insufficient funds.
7. Bank of America failed to credit a cash deposit to Ms. Brito's account. As a result of the bank's error, the February 9, 2001 check was dishonored.
8. A mistaken belief on the part of the Permittee regarding an overdraft account resulted in the February 24, 2001 check being dishonored.

VI. Conclusions of Law

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01, 11.61, and 61.73.
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. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was effected on Permittee pursuant to Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.55(d).
4. The Permittee, its agent, servant, or employee tendered a check in payment for beer, on February 24, 2001, which was dishonored for insufficient funds when presented for payment, in violation of TEX. ALCO. BEV. CODE ANN. § 61.73(b).

5. Based on the foregoing Findings and Conclusions, a three-day suspension of the permits is warranted pursuant to 16 TEX. ADMIN. CODE § 37.60.
6. Pursuant to TEX. ALCO. BEV. CODE ANN. § 11.64, the Permittee should be allowed to pay a \$450.00 civil penalty in lieu of suspension of its permits.

SIGNED this 31st day of December, 2001.


LEAH DAVIS BATES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS