

DOCKET NO. 597290

IN RE STANLEY RAY MCMAHON
D/B/A SPRINGFIELD BAIT HOUSE
PERMIT NO. BQ406431

LIMESTONE COUNTY, TEXAS
(SOAH DOCKET NO. 458-02-2212)

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BEFORE THE

TEXAS ALCOHOLIC

BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of June, 2002, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Suzan Moon Shinder. The hearing convened on May 20, 2002, and adjourned May 20, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on May 28, 2002. 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. BQ406431 is herein **SUSPENDED**.

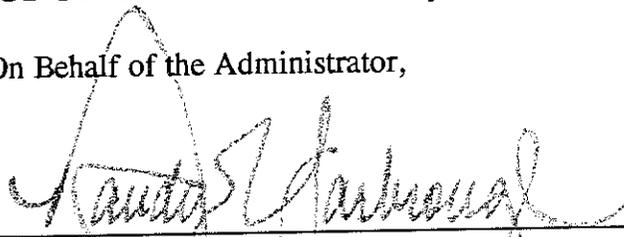
IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of \$750.00 on or before the 7th day of August, 2002, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the 14th day of August, 2002.

This Order will become final and enforceable on **JULY 15, 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 24th day of June, 2002.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

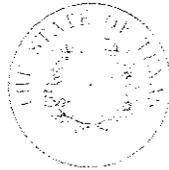
The Honorable Suzan Moon Shinder
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (254) 750-9380

Stanley Ray McMahon
RESPONDENT
d/b/a Springfield Bait House
RR 3, Box 104
Mexia, Texas 76667-9469
CERTIFIED MAIL NO. 7001 2510 0000 7277 8061
& VIA REGULAR MAIL

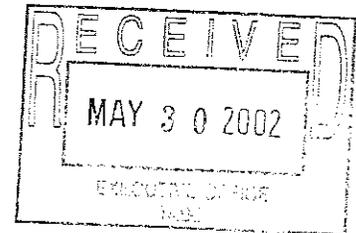
Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Compliance Division
Licensing Division
Waco District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge



May 29, 2002

Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

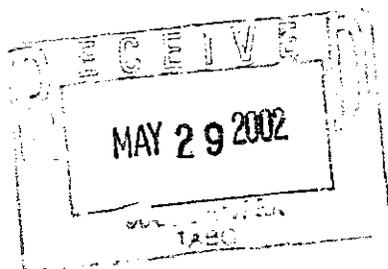
ORIGINAL VIA CERTIFIED MAIL No. Z137716463

RE: Docket No. 458-02-2212; Texas Alcoholic Beverage Commission vs. Stanley Ray McMahon d/b/a Springfield Bait House (TABC Case No. 597290)

Dear Mr. Bailey:

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 Stanley Ray McMahon d/b/a Springfield Bait House. For reasons discussed in the proposal, I recommend that the Respondent's permit should be suspended for five days, or the Respondent should pay a civil penalty of \$150.00 per day for five days, in lieu of suspension.

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,

Suzan Moon Shinder
Administrative Law Judge

SMS:sms
Enclosure

xc: Docket Clerk, State Office of Administrative Hearing - **FAX DELIVERY**
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Ste. 160, Austin, Texas 78731 - **CERTIFIED MAIL NO. Z137716464, RETURN RECEIPT REQUESTED**
Stanley Ray McMahon d/b/a Springfield Bait House, RR 3 Box 104, Mexia, Texas 76667-9469- **CERTIFIED MAIL NO. Z137716465 RETURN RECEIPT REQUESTED**

DOCKET NO. 458-02-2212

**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**

VS.

**STANLEY RAY MCMAHON
D/B/A SPRINGFIELD BAIT HOUSE
PERMIT NO. BQ-406431
LIMESTONE COUNTY, TEXAS
(TABC CASE NO. 597290)**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (the Commission) requested that the permit or license of Stanley Ray McMahon d/b/a Springfield Bait House (the Respondent) be canceled or suspended, alleging that on multiple occasions the Respondent 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. (the Code) §§ 61.73(b)¹ and 102.31. Although duly notified of the hearing on the merits, the Respondent failed to appear. Based on this, the Administrative Law Judge (ALJ) recommends that a default judgement should be taken against the Respondent; the Commission's allegations are deemed admitted as true; and the Respondent's permit should be suspended for five days, or the Respondent should pay a civil penalty of \$150.00 per day, for five days, in lieu of suspension.

I. Statement of the Case

The Commission and the State Office of Administrative Hearings (SOAH) have jurisdiction over this matter, as reflected in the conclusions of law. Notice to the Respondent of the Commission's allegations and intended sanction, and notice to the Respondent of the hearing, met the notice requirements imposed by statute and rule. The details of such notice are set forth in the findings of fact and conclusions of law without further discussion here.

The hearing on the merits was convened on May 20, 2002, at 801 Austin Avenue, Suite 750, Waco, Texas, before ALJ Suzan Shinder. The Commission appeared by telephone, by its staff attorney, Gayle Gordon. The Respondent failed to appear either in person or by telephone, and was

¹Although this section speaks of licenses, Code §25.04(b) states that the provisions of the Code that are applicable to the cancellation and suspension of a retail dealer's on-premise license also apply to the cancellation and suspension of a wine and beer retailer's permit.

not represented at the hearing to contest the Commission's allegations. Evidence of notice to the Respondent was received,² the Commission requested a judgement by default and requested a five day suspension or a \$150.00 per day civil penalty in lieu of suspension, and the record closed the same day.

Because the hearing proceeded on a default basis, the Commission's factual allegations are deemed admitted as true and are incorporated into the findings of fact. Based on the findings of fact and conclusions of law, this proposal recommends the sanction proposed by the Commission, consistent with Code §§6.01(b) and 11.61(b)(2), and 16 TEX. ADMIN. CODE (Rules) §§11.64 and 37.60, set forth in the conclusions of law without further discussion here.

Findings of Fact

1. Stanley Ray McMahon (the Respondent) is the holder of a Wine and Beer Retailer's Off Premise Permit, issued by the Texas Alcoholic Beverage Commission (the Commission) for the premises known as Springfield Bait House, located at Int. N/E Corner Hwy 14 and County Road 456, Mexia, Limestone County, Texas, 76667-9469.
2. The Respondent, its agent, servant, or employee, on September 7, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
3. The Respondent, its agent, servant or employee, on October 1, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
4. The Respondent, its agent, servant, or employee, on October 10, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
5. The Respondent, its agent, servant, or employee, on October 11, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
6. The Respondent, its agent, servant, or employee, on October 12, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
7. The Respondent, its agent, servant, or employee, on October 15, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
8. The Respondent, its agent, servant or employee, on October 19, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.

²The Commission's Exhibit No. 1 is the Commission's Notice of Hearing in this case, with a xerox of a "return receipt" card showing certified mail receipt on April 1, 2002, to: Stanley Ray McMahon d/b/a Springfield Bait House, RR 3, Box 104, Mexia, TX 76667-9469, signed by the Respondent's "agent," Tris Burkett; The Commission's Exhibit No. 2 is a certified copy of the Respondent's Wine and Beer Retailer's Off Premise Permit, BQ-406431, showing a last known mailing address for the Respondent of: Springfield Bait House, Stanley Ray McMahon, RR 3, Box 104, Mexia, TX 76667-9469.

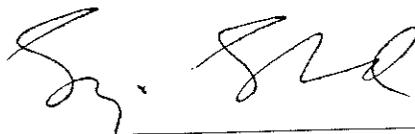
9. The Respondent, its agent, servant or employee, on October 22, 2001, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
10. On March 29, 2002, the Commission sent its Notice of Hearing to the Respondent's last known mailing address by certified mail, return receipt requested. This Notice of Hearing informed the Respondent that the hearing on the merits was set for May 20, 2002, at 1:00 p.m., and it contained: a statement of the location and the 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 allegations and the relief sought by the Commission.
11. According to the "return receipt," the Respondent received this Notice of Hearing on April 1, 2002.
12. The Commission's Notice of Hearing contained the statement in 10-point, bold-face type, that if a party failed to appear at the hearing, the factual allegations in the notice would be deemed admitted as true, and the relief sought in the notice could be granted by default.
13. On April 9, 2002, the undersigned Administrative Law Judge (ALJ) mailed the Pre-Trial Order No. 1, Setting Hearing & Establishing Requirements for Participation (Pre-Trial Order) to the Respondent's last known mailing address by regular mail. This letter was never returned to the ALJ.
14. The Pre-Trial Order advised the Respondent of the possibility of appearing by telephone for the hearing on the merits, informing the Respondent that if it appeared by telephone, it was to make its appearance at (254) 582-7073. It also informed the Respondent that it was to notify the ALJ immediately if this was not the telephone number at which the Respondent would be making its appearance for purposes of the hearing. The order also informed the Respondent that a failure to answer the telephone within fifteen minutes after the time designated for the start of the hearing would be taken as a failure to appear.
15. The Respondent never contacted the ALJ to provide a different telephone number from that listed in the Pre-Trial Order.
16. On May 20, 2002, the hearing on the merits was convened at 1:00 p.m. The Respondent was not represented, failed to appear in person, and failed to appear by telephone at (254) 582-7073, at (254) 562-7936, and at (254) 562-7073,³ for more than fifteen minutes past 1:00 p.m., and the Commission moved for a default judgement.

³(254) 582-7073 was reportedly a "wrong number." The Commission provided the ALJ with the additional two numbers from their records, in an additional effort to contact the Respondent for the hearing.

Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (Code) Subchapter B of Chapter 5.
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. ch. 2003.
3. Based on Findings of Fact Nos. 10-16, proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052; Code §11.63; and 1 TEX. ADMIN. CODE §155.55.
4. After proper and timely notice of the hearing, the Respondent failed to appear. As a result, the Commission's allegations as reflected in its Notice of Hearing are deemed admitted as true, and a default judgement should be entered against Respondent, pursuant to 1 TEX. ADMIN. CODE §155.55.
5. Each time the Respondent gave a check or draft for the purchase of beer (on September 7, 2001; October 1, 2001; October 10, 2001; October 11, 2001; October 12, 2001; October 15, 2001; October 19, 2001; and October 22, 2001) that was dishonored when presented for payment, the Respondent violated Code §§61.73(b) and 102.31.
6. Sections 61.73(b) and 102.31 of the Code prohibit the giving of a check, as maker or endorser, or a draft, as drawer or endorser, as full or partial payment for beer or the containers or packages in which it is contained or packaged, which is dishonored when presented for payment.
7. The Commission is authorized to cancel or suspend the Respondent's permit for not more than 60 days pursuant to Code §§6.01(b) and 11.61(b)(2).
8. The Standard Penalty Chart as set forth in 16 TEX. ADMIN. CODE (Rules) §37.60, suggests a minimum penalty of a warning to a three day suspension of the permit or license. It suggests a maximum penalty of a fifteen day suspension.
9. Based on the above findings and conclusions, the Respondent's permit should be suspended for five days. In the alternative, the Respondent should pay a civil penalty of \$150.00 per day for five days, pursuant to Code §11.64 and Rules §37.60.

Signed this 28th day of May, 2002.



SUZAN MOON SHINDER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS