

DOCKET NO. 458-03-0432

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

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BEFORE THE STATE OFFICE

VS.

OF

CAFÉ MADRID INC.
DALLAS COUNTY, TEXAS
(TABC CASE NO. 598011)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) alleged that Café Madrid Inc. (Respondent) was wrongfully in possession of distilled spirits. Staff sought to suspend Respondent's permit for five days, or alternatively, to require Respondent to pay a penalty of \$750. The Administrative Law Judge (ALJ) recommends that Respondent's permit be suspended for two days or that Respondent pay a penalty of \$300.

I. PROCEDURAL HISTORY & JURISDICTION

Notice and jurisdiction were not contested issues, and those matters are addressed in the proposed Findings of Fact and Conclusions of Law.

On November 21, 2002, a hearing was convened before ALJ Robert F. Jones Jr., at 6333 Forest Park Road, Suite 150A, Dallas, Dallas County, Texas. The Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared through its owner, Donica Jimenez. The record closed on November 21, 2002.

II. DISCUSSION

A. Applicable Law

The TABC may suspend a wine and beer retailers permit if the "permittee, [or an] officer of the permittee, [possesses] distilled spirits . . . on the licensed premises." TEX. ALCO. BEV. CODE ANN. §§ 29.05, 11.61(b)(2), & 61.71(a)(1)&(9) (Vernon 2002) (the Code).

B. Evidence

The TABC issued wine-and-beer-retailer's permit BG14848 and food-and-beverage certificate FB262259 to Respondent. Respondent's permitted premises are located at 4501 Travis Street, Dallas, Dallas County, Texas.



On November 16, 2001, Sergeant Chris Hamilton, an inspector with the TABC, made an inspection of Café Madrid. He found two unopened, 1-liter bottles of triple sec on the premises. Triple sec is a distilled spirit. Donica Jimenez explained that the café used orange flavored wine in cooking. A representative of a wholesaler had told Ms. Jimenez he could offer her a better price on the orange flavored wine. The triple sec was delivered to the café to fulfill that promise. Ms. Jimenez stated she checked the alcohol content of the triple sec, and found it was less than the 17% she was allowed under her permit. *See* § 25.01(1) of the Code (holder of a wine and beer retailer's permit may sell for consumption . . . wine, beer, and malt liquors containing alcohol in excess of one-half of one percent by volume and not more than 17 percent by volume). She stated she did not consider whether the triple sec was distilled. Ms. Jimenez argued that she made a simple mistake.

Sergeant Hamilton testified Café Madrid committed a "technical violation," rather than a health or safety violation. Café Madrid's only other violation was for a bookkeeping error discovered during an audit.

C. Analysis, Conclusion, and Recommendation

The evidence discloses a *per se* violation of § 25.09 of the Code. This is a "major regulatory violation," as defined in the Standard Penalty Chart. 16 TEX. ADMIN. CODE § 37.60(a). For a first offense the Standard Penalty Chart calls for a suspension of five days. 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." *Id.* § 37.60(g).

Ms. Jimenez, acting on behalf of Café Madrid, should know all the terms and limitations imposed by the permit. She showed some awareness of the limits of the permit when she examined the alcohol content of the triple sec and compared that to what she could sell. She should have also known that distilled spirits were absolutely banned from the premises. Considering all the facts, it appears that Ms. Jimenez made a mistake.

The ALJ recommends the TABC find Respondent possessed distilled spirits on the licensed premises. The TABC should order that Respondent's permit be suspended for two days, or alternatively, that Respondent pay a \$300 civil penalty.

IV. PROPOSED FINDINGS OF FACT

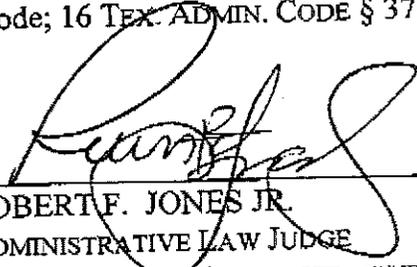
1. The TABC issued wine-and-beer-retailer's permit BG14848 and food-and-beverage certificate FB262259 to Respondent.
2. Respondent's permitted premises are located at 4501 Travis Street, Dallas, Dallas County, Texas.
3. On November 16, 2001, Sergeant Chris Hamilton, an inspector with the TABC, made an inspection of Café Madrid.
4. Sergeant Hamilton found two unopened, 1-liter bottles of triple sec on the premises

5. Triple sec is a distilled spirit.
6. Respondent did not possess distilled spirits on the licensed premises intentionally, but as the result of a mistake.
7. On October 10, 2002, Staff issued a notice of hearing (NOH) and served the NOH on Respondent. The NOH informed all parties that a hearing would be held concerning Staff's allegations and informing the parties of the time, place, and nature of the hearing, of the legal authority and jurisdiction under which the hearing was to be held, giving reference to the particular sections of the statutes and rules involved, and including a short, plain statement of the matters asserted.
8. On November 21, 2002, a hearing was convened before ALJ Robert F. Jones Jr., at 6333 Forest Park Road, Suite 150A, Dallas, Dallas County, Texas. The Staff was represented by Timothy E. Griffith, an attorney with the Texas Alcoholic Beverage Commission (TABC) Legal Division. Respondent appeared through its owner, Donica Jimenez. The record closed on November 21, 2002.

V. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 29 of the Code.
2. SOAH has jurisdiction over all matters relating to the conduct of 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. ch. 2003 (Vernon 2001).
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§2001.051 and 2001.052 (Vernon 2001).
4. Based on the foregoing findings, Respondent, holding a wine-and-beer-retailer's permit, possessed a distilled spirit on the licensed premises. § 29.05 of the Code.
5. Based on the foregoing findings and conclusions, Respondent's permit should be suspended for two days, or alternatively, Respondent should pay a civil penalty of \$300. See §§ 29.05, 11.61(b)(2), & 61.71(a)(1)&(9) of the Code; 16 TEX. ADMIN. CODE § 37.60.

SIGNED December 11, 2002.



ROBERT F. JONES JR.
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 598011

IN RE CAFÉ MADRID INC.	§	BEFORE THE
D/B/A CAFÉ MADRID INC.	§	
PERMIT NOS. BG314848, FB262259	§	
	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-0432)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 24th day of January 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Robert Jones. The hearing convened on November 21, 2002, and adjourned on November 21, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on December 11, 2002. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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. BG314848 and FB262259 are hereby **SUSPENDED** for two (2) days.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$300.00** on or before the **19th** day of **March, 2003**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of two (2) days days, **beginning at 12:01 A.M. on the 26th** day of **March, 2003**.

This Order will become final and enforceable on February 14, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 24th day of January, 2003.

On Behalf of the Administrator,



Jeannene Fox, Acting Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Robert Jones
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (817) 377-3706

CAFÉ MADRID INC.
D/B/A CAFÉ MADRID INC.
RESPONDENT
2824 Rosedale Ave.
Dallas, TX 75205-1531
CERTIFIED MAIL NO. 7001 2510 0003 8688 6667

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 598011

REGISTER NUMBER:

NAME: CAFÉ MADRID INC.

TRADENAME: CAFÉ MADRID INC.

ADDRESS: 4501 Travis Street, Dallas, Texas 75205

DATE DUE: March 19, 2003

PERMITS OR LICENSES: BG314848, FB262259

AMOUNT OF PENALTY: \$300.00

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 19TH DAY OF MARCH, 2003, 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.