

DOCKET NO. 607958

IN RE BALLS HAMBURGERS	§	BEFORE THE
PRIVATE CLUB	§	
D/B/A BALLS HAMBURGERS	§	
PRIVATE CLUB	§	
PERMIT NOS. N-188762, PE188763,	§	
FB413942	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-8248)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 4th day of February, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Brenda Coleman. The hearing convened on November 17, 2004, and adjourned on November 17, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 13, 2005. 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.

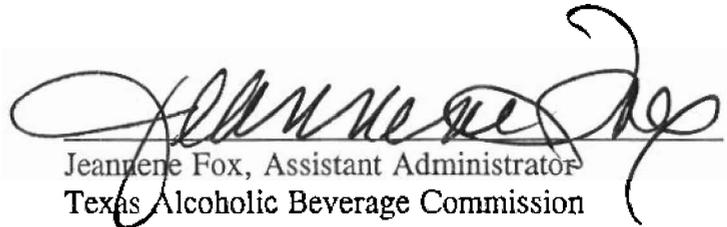
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the above described permits/licenses numbers are hereby **CANCELED FOR CAUSE**.

This Order will become final and enforceable on February 25, 2005, 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.

SIGNED on this 4th day of February, 2005, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

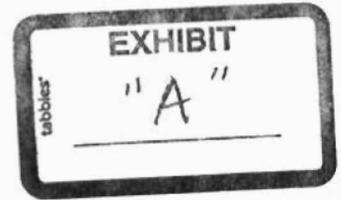
The Honorable Brenda Coleman
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (214) 956-8611

Balls Hamburgers Private Club
RESPONDENT
PO Box 29959
Dallas, TX 75229-0959
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1930 0992

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Dallas District Office



SOAH DOCKET NO. 458-04-8248

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
	§	
V.	§	OF
	§	
BALLS HAMBURGER PRIVATE	§	
CLUB,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this action against Balls Hamburger Private Club (Respondent), alleging that Respondent has committed numerous violations of the Texas Alcoholic Beverage Code. Respondent failed to appear at the hearing, and the hearing proceeded on a default basis. Petitioner requested that Respondent's permits be canceled for cause. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5 and 32, §§ 6.01, 11.61 and 109.53. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

SOAH scheduled this matter for hearing on September 9, 2004. On August 12, 2004, Petitioner issued its notice of hearing, directed to Respondent at Respondent's last known designated mailing address: P.O. Box 29959, Dallas, Texas, 75229-0959, via certified mail, return receipt requested.¹ 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

¹ Service of notices of hearings, pleadings, or other documents related to contested cases shall be by certified mail addressed to the permittee's last known address as reflected in the commission's records. A certificate of service to such address shall be prima facie evidence of adequate service on the permittee. 16 TEX. ADMIN. CODE § 37.3.

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and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052. The notice of hearing also contained the following language in 12-point or larger boldface type: "If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default." On October 26, 2004, Petitioner's notice was returned unclaimed from the U.S. Postal Service with the notations "return to sender unclaimed unable to forward."

On August 13, 2004, SOAH also notified Respondent of the scheduled hearing's date, time, and location, via regular mail sent to Respondent at Respondent's last known address. Respondent received this notification on August 31, 2004, as evidenced by Respondent's written request for continuance filed on the same date, via facsimile. The written request was signed by Richard Barry Hobrecht, President, Balls Hamburgers Private Club, and included the following fax number: 214-350-8878.

On September 1, 2004, Petitioner filed a response to Respondent's request for continuance and faxed a copy to Respondent at Respondent's fax number provided in the request. Petitioner indicated that it did not oppose the request. Petitioner also requested that the matter be reset at 1 p.m. on November 17, 2004. Also on September 1, 2004, Petitioner faxed a copy of its notice of hearing, prehearing statement, and discovery requests to Respondent at the same fax number.²

The ALJ granted Respondent's request for continuance and reset the hearing for 1 p.m. on November 17, 2004. On September 1, 2004, SOAH notified Respondent of the reset date and time, via regular mail sent to Respondent at Respondent's last known address. SOAH has not received the mailing back from the U.S. Postal Service; therefore, the ALJ presumes that Respondent received notice of the

² Respondent's Exhibit One consisted of 13 pages including the "Message Confirmation" page, which indicated 12 pages were successfully transmitted to Respondent's fax number at 1:38 p.m. on September 1, 2004. Admission of evidence showing a telephonic document transfer to the recipient's current telecopier number gives rise to a presumption that notice was duly received by the addressee. *Am. Paging of TX, Inc. v. El Paso Paging*, 9 S.W.3d 237 (Tex.App.-El Paso 999).

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PROPOSAL FOR DECISION

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hearing's date, time and location.³

On November 17, 2004, a hearing convened before SOAH ALJ Brenda Coleman at 6333 Forest Park Road, Suite 1500-A, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by Timothy Griffith, TABC Staff Attorney. Respondent did not appear and was not represented at the hearing. Petitioner presented evidence regarding notice and jurisdiction. The record closed on November 17, 2004.

II. DISCUSSION

Respondent's action of failing to claim the notice of hearing issued by Petitioner on August 12, 2004, via certified mail, return receipt requested from the U.S. Postal Service precluded Respondent from receiving delivery of the notice. However, there is no question that Respondent received SOAH's August 13, 2004, notification of the hearing scheduled for September 9, 2004, as evidenced by Respondent's request for a continuance on August 31, 2004. On September 1, 2004, Petitioner again attempted to deliver its notice of hearing to Respondent via facsimile to the fax number provided by Respondent. Also on September 1, 2004, SOAH mailed the reset order to Respondent at Respondent's last known address. The ALJ believes that the steps taken by Petitioner, as well as SOAH, to provide Respondent with notice of the hearing were reasonable and legally sufficient in this instance.

Based on the failure of Respondent to appear at the hearing, Petitioner requested that the default provisions of 1 TEX. ADMIN. CODE (TAC) § 155.55 be invoked. The ALJ finds that Petitioner issued notice in compliance with 1 TAC §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN. § 11.63. Pursuant to 1 TAC § 155.55, the allegations presented in the notice of hearing are deemed admitted as true. Accordingly, the ALJ has incorporated these allegations into the Proposed Findings of Fact below. Based on the deemed factual findings in this case, Respondent's permits should be canceled.

³ 1 TEX. ADMIN. CODE § 155.25(d)(3) provides for a rebuttable presumption if a document was sent to a party to a proceeding by regular mail, certified mail, or registered mail. In that instance, the judge is to presume that the mailed document was received no later than three days after mailing.

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III. FINDINGS OF FACT

1. Balls Hamburger Private Club (Respondent), holds a Private Club Registration Permit, N-1188762, a Beverage Cartage Permit, PE-188763, and a Food and Beverage Certificate, FB-413942, issued by the Texas Alcoholic Beverage Commission (Petitioner), for the premises located at 3404 Rankin, University Park, Dallas County, Texas.
2. Respondent's last known designated mailing address, as reflected in Petitioner's records, is P.O. Box 29959, Dallas, Texas, 75229-0959.
3. On August 12, 2004, Petitioner issued its notice of hearing to Respondent at Respondent's last known address via certified mail, return receipt requested.
4. 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.
5. The notice of hearing also contained the following language in 12-point or larger boldface type: "If a party fails to appear at the hearing, the factual allegations in the notice of hearing will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default."
6. On October 6, 2004, Petitioner's notice was returned unclaimed from the U.S. Postal Service with the notations "return to sender unclaimed unable to forward."
7. On August 13, 2004, SOAH also notified Respondent of the scheduled hearing's date, time, and location, via regular mail sent to Respondent at Respondent's last known address.
8. Respondent received this notification on August 31, 2004, as evidenced by Respondent's written request for continuance filed on the same date, via facsimile. The written request was signed by Richard Barr /Hobrecht, President, Balls Hamburgers Private Club, and included the following fax number: 214-350-8878.
9. On September 1, 2004, Petitioner filed a response to Respondent's request for continuance and faxed a copy to Respondent at Respondent's fax number provided in the request. Petitioner indicated that it did not oppose the request. Petitioner also requested that the matter be reset at 1 p.m. on November 17, 2004.
10. Also on September 1, 2004, Petitioner faxed a copy of its notice of hearing, prehearing statement, and discovery requests to Respondent at the same fax number.
11. The ALJ granted Respondent's request for continuance and reset the hearing for 1 p.m. on

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November 17, 2004. On September 1, 2004, SOAH notified Respondent of the reset date and time, via regular mail sent to Respondent at Respondent's last known address.

12. A hearing convened before Brenda Coleman, Administrative Law Judge with the State Office of Administrative Hearings (SOAH), on November 15, 2004. Petitioner appeared through its Staff Attorney, Timothy Griffith. Respondent did not appear and was not represented at the hearing. The record closed on that same date.
13. On or about August 8, 2003, Respondent failed to have a membership committee composed of three or more members.
14. On or about August 8, 2003, Respondent failed to keep a complete set of membership minutes.
15. On or about August 8, 2003, Respondent failed to approve non-charter members by committee vote.
16. On or about August 8, 2003, Respondent failed to have or keep preliminary applications
17. On or about August 8, 2003, Respondent failed to approve preliminary applications within three days and/or keep records of the applications.
18. On or about August 8, 2003, Respondent failed to maintain source records that showed the percentage of alcoholic beverage replacement.
19. On or about August 8, 2003, Respondent deposited funds other than the designated percentage of service charges in the replacement account.
20. On or about August 8, 2003, Respondent purchased alcoholic beverages from funds other than funds in the replacement account.
21. On or about June 30, 2003, Respondent failed to keep proper replacement account records.
22. Respondent has entered into a device, scheme or plan which has surrendered control of the premises or business of the permittee to a person or persons other than the permittee.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. chs. 5 and 32, §§ 6.01, 11.61 and 109.53.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision

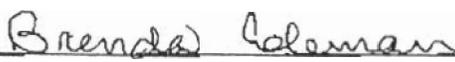
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PROPOSAL FOR DECISION

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- containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was issued to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, 1 TEX. ADMIN. CODE (TAC) § 155.55 and 16 TAC § 37.3.
 4. Respondent is presumed to have received notice of hearing. *Am. Paging of TX, Inc. v. El Paso Paging*, 9 S.W.3d 237 (Tex.App.-El Paso 1999) and 1 TAC § 155.25(d)(3).
 5. The place or manner in which Respondent conducts its business warrants cancellation of the permits based on the general welfare, peace, morals and safety of the people and on the public sense of decency.
 6. A default decision should be entered against Respondent pursuant to 1 TAC § 155.55
 7. Respondent violated the TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 11.61(b)(7), 32.03(d), 32.06(b)(1), 32.06(b)(2), 32.06(b)(3), 32.06(b)(5), and 109.53.
 8. Respondent's permits should be canceled. TEX. ALCO. BEV. CODE ANN. §§ 11.61 (b)(2), 11.61(b)(7), 32.03(a) and 109.53.

SIGNED January 13, 2005.



BRENDA COLEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS