

SOAH DOCKET NO. 458-07-0817

TEXAS ALCOHOLIC BEVERAGE
COMMISSION,
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

ITALIAN BROTHERS, INC.
D/B/A GINO'S ITALIAN GRILL
TRAVIS COUNTY, TEXAS
(TABC CASE NO. 547332),
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (Staff, TABC) brought this disciplinary action against Italian Brothers, Inc. d/b/a Gino's Italian Grill (Respondent), alleging that Respondent issued checks or drafts for the purchase of beer which were dishonored when presented for payment, in violation of the Texas Alcoholic Beverage Code. Staff requested that Respondent's Mixed Beverage Permit, Mixed Beverage Late Hours Permit MB254321 be suspended for six days, or in lieu of suspension, that Respondent pay a civil penalty of \$900. The Administrative Law Judge (ALJ) agrees with Staff's request.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61(b)(2), 24.06, 61.71(a)(1), and 61.73(b). 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.

On November 13, 2006, Staff issued its notice of hearing, directed to Respondent at 730 West Stassney Lane 'A', Austin, Texas 78745, via certified mail, return receipt requested. The notice of hearing was returned. However, on November 29, 2006, Staff and Respondent filed an Agreed Motion for Continuance, which was granted, continuing the hearing to January 8, 2007.¹

On January 8, 2007, a hearing convened before ALJ Sharon Cloninger in the William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. TABC was represented at the hearing by W. Michael Cady, Staff Attorney. Respondent did not appear and was not represented at the hearing. After presentation of evidence regarding notice, jurisdiction, and Respondent's prior violations, the record closed on that same date.

II. DISCUSSION

Based on the failure of Respondent to appear at the hearing, Staff requested that the default provisions of 1 TEX. ADMIN. CODE (TAC) § 155.55 be invoked. The ALJ finds that Staff 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 Findings of Fact below.

III. FINDINGS OF FACT

1. Italian Brothers, Inc. d/b/a Gino's Italian Grill (Respondent) holds Mixed Beverage Permit, Mixed Beverage Late Hours Permit MB254321, issued by the Texas Alcoholic Beverage Commission (TABC), for the premises located at 730 West Stassney Lane 'A', Austin, Texas 78745. Respondent's mailing address is the same as the physical address.

¹ Because Respondent faxed a letter to TABC on November 29, 2006, specifically requesting that the December 4, 2006 hearing be rescheduled, the ALJ presumes he received a copy of the Notice of Hearing via regular mail.

2. On November 13, 2006, TABC staff issued a notice of hearing to Respondent, for a hearing to be held on December 4, 2006. This notice of hearing sent via certified mail was returned to TABC; the notice of hearing sent via regular mail was not returned.
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 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.
5. On November 29, 2006, TABC staff filed an Agreed Motion for Continuance, which was granted November 30, 2006, with the hearing on the merits continued to 9 a.m. January 8, 2007. The order was sent to Respondent via regular mail at the address set out in Finding of Fact No. 1, and was not returned to the State Office of Administrative Hearings (SOAH).
6. On January 8, 2007, the hearing on the merits convened before ALJ Sharon Cloninger at the William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. TABC was represented by W. Michael Cady, Staff Attorney. Respondent did not appear and was not represented at the hearing.
7. On or about July 27, 2006, Respondent or Respondent's agent, servant, or employee, gave a check or draft for the purchase of beer that was dishonored when presented for payment.
8. On or about July 27, 2006, Respondent or Respondent's agent, servant, or employee, gave a check or draft for the purchase of beer that was dishonored when presented for payment.²
9. On or about September 7, 2006, Respondent or Respondent's agent, servant, or employee, gave a check or draft for the purchase of beer that was dishonored when presented for payment.

² Count 2 in the Notice of Hearing is identical to Count 1. The ALJ assumes two different checks are were dishonored.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5, §§ 11.61(b)(2), 24.06, 61.71(a)(1), and 61.73(b).
2. 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.
3. Proper and timely notice of the hearing was affected on 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. A default judgment should be entered against Respondent pursuant to 1 TAC § 155.55.
5. Based on Findings of Fact Nos. 7, 8 and 9, Respondent violated TEX. ALCO. BEV. CODE ANN. §§ 28.12, 61.73, and 102.31.
6. Based on Conclusion of Law No. 5 and TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 24.06, 61.71(a)(1), 61.73(b), and 102.31, Respondent's permit should be suspended for six days.
7. Based on Conclusion of Law No. 6 and TEX. ALCO. BEV. CODE ANN. § 11.64, Respondent should be permitted to pay a civil penalty of \$900 in lieu of suspension of the permit.

SIGNED February 27, 2007.


SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS