

DOCKET NO. 588446

IN RE THE RENEWAL
APPLICATION OF BABE'S CLUB

PERMIT NOS. N-405322, NL-405323
& PE-405324

DALLAS COUNTY, TEXAS
(SOAH DOCKET NO. 458-00-1978)

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

ORDER

CAME ON FOR CONSIDERATION this 18th day of December, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Tanya Cooper. The hearing convened on September 29, 2000, and adjourned September 29, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on November 20, 2000. 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 Nos. N-405322, NL-405323 and PE-405324 are hereby **CANCELED FOR CAUSE AND ITS RENEWAL APPLICATION DENIED**.

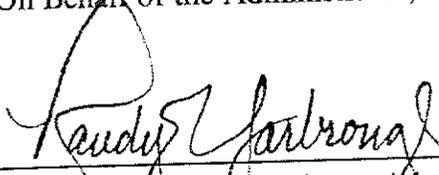
IT IS FURTHER ORDERED that all rights and privileges under the above described permits will be **CANCELLED FOR CAUSE AND ITS RENEWAL APPLICATION DENIED**.

This Order will become final and enforceable on January 8, 2001, 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 18th day of December, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
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Licensing Division
Dallas District Office

DOCKET NO. 458-00-1978

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

V.

BABE'S CLUB
PERMIT NOS. N-405322, NL-405323,
& PE-405324
DALLAS COUNTY, TEXAS
(TABC CASE NO. 588446)

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission's staff (TABC Staff) brought this action against Babe's Club (Respondent), alleging that it had failed to pay a debt for taxes, fees, or penalties, and that as a result of its failure to make this payment, Respondent had violated Texas Alcoholic Beverage Code (the Code) § 11.61(b)(5)(Vernon 2000). TABC Staff requested that Respondent's permits be canceled and that its reapplication for permits be denied. This proposal finds that Respondent did fail to pay a debt for a fee in violation of the Code. The Administrative Law Judge (ALJ) recommends cancellation of Respondent's permits and denial of its reapplication for these permits.

JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under Chapter 5 and §§ 6.01 and 32.01 of the Code. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. GOV'T CODE ANN. § 2003.021(Vernon 2000). There are no contested issues of notice or jurisdiction in this proceeding.

On September 29, 2000, a hearing convened before ALJ Tanya Cooper, in the State Office of Administrative Hearings, located at 6333 Forest Park Road, Suite 150A, Dallas, Dallas County, Texas. Petitioner was represented at the hearing by Dewey Brackin, TABC Staff Attorney. Respondent appeared and was represented by counsel, David L. Hatch, Attorney at Law. Evidence was received from both parties through witness testimony and documentary evidence. The record was closed on September 29, 2000.

APPLICABLE LAW

Pursuant to § 11.61(b)(5) of the Code, the Texas Alcoholic Beverage Commission is authorized to suspend for not more than 60 days or cancel a permit if a permittee is indebted to the State for taxes, fees, or payments of penalties imposed by the Code. In this instance, Staff alleges that fees required according to the Code § 32.02¹ were not paid by Respondent.

EVIDENCE AND PARTIES' CONTENTIONS

Respondent holds Private Club Registration Permit N-405322, Private Club Late Hours Permit NL-405323, and Beverage Cartage Permit PE-405324, issued to Babe's Club, 580 W. Arapaho Road, Suite 134, Richardson, Dallas County, Texas (Babe's). Babe's made a renewal application for these permits on January 6, 2000. TABC Staff filed a protest of this application alleging that Babe's had failed to pay delinquent permit fees in the amount of \$29,601.00. The amount of delinquent permit fees were calculated during an audit of Babe's records by Staff.

Howard Taylor, TABC compliance officer, testified that he made an audit of Babe's

¹Section 32.02 of the Code provides:

- (a) Each private club registration permittee shall pay an annual state fee for each separate place of business.
- (b) The annual state fee shall be computed at the election of the permittee by using one of the following methods:
 - (1) A fee based on the highest number of members in good standing during the year for which the permit fee is paid according to the following rates:

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|-----------------------|-----------------------|
| 0 to 250 members - | \$ 750 |
| 215 to 450 members - | \$1,350 |
| 451 to 650 members - | \$1,950 |
| 651 to 850 members - | \$2,550 |
| 851 to 1000 members - | \$3,000 |
| Over 1000 members - | \$3.00 per member; or |

(2) Except as provided by Subsection (d) of this section, a fee for an original private club registration permit of \$3,500, with a fee for the first renewal of a private club registration permit of \$2,750, and a fee for the second and each subsequent renewal of a private club registration permit of \$2,000.

- (c) A permittee who elects to compute the permit fee based on Subsection (b)(1) of this section may not alter the method by which the fee is calculated until the second renewal or renewal subsequent to the second renewal.
- (d) A permit holder who has elected to restrict the holder's authorized activities under the permit as provided by Section 32.01(b) of this code shall pay an original permit fee of \$1,500 and an annual renewal fee of \$1,500.
- (e) No later than 90 days before the expiration of the year for which the permit fee is paid, the permit holder may submit an amended application with as much additional fee as is required under the amended return.

membership records on November 23, 1999. These records were maintained for Babe's by Source Data, an electronic data-base servicing company. Membership records showed, in part, that Babe's membership ranged as follows:

- January 8, 1997--46 members;
- September 30, 1997--876 members;
- August 18, 1998--4588 members; and
- November 13, 1999--2318 members.

It is undisputed by the parties that Babe's was operating pursuant to its election under §32.02(b)(1) of the Code. Mr. Taylor's audit showed that during its operations in the years 1997, 1998, and 1999, Babe's made permit fee payments of \$750.00 each year, placing itself within the 0-250 membership category. Source Data records revealed Babe's membership greatly exceeded 250 persons for the years 1997 through 1999, as illustrated above. Mr. Taylor's compilation of fees owed, based upon the information provided to him from Babe's membership records, showed Babe's owed permit fees totaling \$31,851.00 for the three year period. After deducting Babe's actual yearly payments (\$750.00 per year or \$2,250.00 total), a balance remained due and unpaid in the amount of \$29,601.00. It is undisputed that this amount has not been paid.

Mr. Taylor further testified that Babe's membership records did not reflect any substantial purge of the membership lists over the three year period covered by his audit. He stated that the purging of membership lists by a private club is allowed after a member is maintained in its records for a minimum period of four (4) days, or it is often done at established at points such as every six months or yearly. One purge or deletion of members from Babe's records was noted by Mr. Taylor in November 1997.

Babe's had received a warning from TABC Staff that its membership was too high for the fee it had remitted in 1997 (See TABC Exhibit 3). Mr. Taylor stated that keeping members on its records for a long period of time was the cause of Babe's large membership count.

Mildred Sizemore, Babe's owner, testified at the hearing. She stated that she had been employed at Babe's for six years when she purchased the business in 1996. Membership records at that time had been maintained manually and purged on a monthly basis. Source Data had been recommended to her by other bar operators, so after purchasing the club she contracted with Source Data for electronic record maintenance. She testified that she assumed Source Data knew of Babe's policy of purging membership on a thirty day basis to her account representative's attention when she began using Source Data's services, but the representative said that all other accounts served by the company were on an annual purge time frame.

Ms. Sizemore testified that the first time she knew there was a problem with the record maintenance and fee payments was when Mr. Taylor completed his audit in 1999. According to Ms. Sizemore, her club averages between 140 and 180 members. The premises' occupancy limit or

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capacity rating provides that between 100 and 200 persons may be on the premises. She stated that upon learning about the problem associated with Source Data's record maintenance, she called her account representative and established a four (4) day purge period for Babe's membership records. This action, according to Ms. Sizemore, has reduced the membership numbers.

Ms. Sizemore contends that Source Data is responsible for creating the extremely large delinquency in Babe's fees because it failed to properly purge the club's membership records. She stated that she cannot pay the amount as calculated by Mr. Taylor and requested an equitable adjustment in the amount of fees owed by Babe's.

ANALYSIS

From the evidence presented, Staff met its burden of proof establishing that Babe's failed to pay a debt for fees. Although Babe's made some required permit fee payments during 1997, 1998, and 1999 (\$750.00 yearly), these payments were not in a sufficient amount as provided for by the Code. The payments clearly indicated that Babe's had elected to operate under provisions of the Code which placed it within the 0-250 membership fee scale range. Babe's membership at times during those three years greatly exceeded 250 members. Because its membership records were in excess of the 0-250 level, the proper permit fees would have been considerably greater than the amounts remitted by Babe's and have remained unpaid to date.

While it is likely that Babe's membership records may have been overstated due to the techniques employed for records maintenance by Babe's record keeping company, Source Data, Babe's is nevertheless responsible for any delinquent fees that may be attributable to this error. Source Data and Babe's entered into an agreement by which Source Data undertook to provide this service to Babe's. If errors were occurring in Source Data's services, it was the responsibility of Babe's management to detect and correct any problems, particularly when the membership numbers reported so greatly exceeded the number of members that Babe's claims it actually has, the length of time over which this practice occurred, and because discrepancies in the fees being remitted and the membership records had been noted in a warning to Babe's from TABC Staff in 1997.

TABC Staff requested cancellation for cause of Respondent's permits and protested the reapplication for permits by Respondent. The ALJ agrees with Staff and recommends that Respondent's permits be canceled and any reapplication for permits be denied.

FINDINGS OF FACT

1. Babe's Club (Respondent) holds a Private Club Registration Permit N-405322, Private Club Late Hours Permit NL-405323, and Beverage Cartage Permit PE-405324, for a premises located at 580 W. Arapaho Road, Suite 134, Richardson, Dallas County, Texas, and executed a reapplication for these permits on January 6, 2000.

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2. The Texas Alcoholic Beverage Commission Staff (TABC Staff) protested Respondent's reapplication for permits, and on July 25, 2000, gave Respondent notice of the hearing by certified mail, return receipt requested. Respondent did not challenge the sufficiency of notice and appeared at the hearing. TABC Staff was represented by Dewey Brackin, TABC Staff Attorney. Respondent was represented at the hearing by counsel, David L. Hatch.
3. On November 23, 1999, Respondent's membership records were audited by TABC staff.
4. The audit period was from January 8, 1997, through November 13, 1999.
5. The membership records, maintained by Respondent's electronic record keeping company, Source Data, showed that Respondent's membership had ranged from a low of 46 members to a high of 4588 members during the audit period.
6. From January 8, 1997, through November 13, 1999, Respondent elected to remit state permit fees at a level established for a private club with a membership ranging from zero to 250 members, and had paid the permit fee of \$750.00 per year applicable for that membership level.
7. The correct amount of Respondent's state permit fees totaled \$31,851.00 for January 8, 1997, through November 13, 1999, and after deducting the total fees paid by Respondent (\$2,250.00 or \$750.00 for the three year audit period), Respondent owed a total permit fee in the amount of \$29,601.00.
8. The \$29,601.00 described in Finding of Fact No. 7 has not been paid by Respondent.

CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. Ch. 5 and §§ 6.01 and 32.01 (Vernon 2000).
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting 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 2000).
3. Respondent received adequate notice of the proceedings and hearing.
4. Based on Findings of Fact Nos. 3 - 8, Respondent has failed to pay a debt for fees in violation of TEX. ALCO. BEV. CODE ANN. § 32.02 (Vernon 2000).
5. Based on Findings of Fact Nos. 3 - 8 and Conclusion of Law No. 4, Respondent's Private

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Club Registration Permit N-405322, Private Club Late Hours Permit NL-405323, and Beverage Cartage Permit PE-405324 should be canceled for cause and its reapplication for permits denied pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61(b)(5)(Vernon 2000).

SIGNED this 20th day of November, 2000.



TANYA COOPER
Administrative Law Judge
State Office of Administrative Hearings