

DOCKET NO. 458-03-2059

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION	§	
	§	
VS.	§	OF
	§	
THE BRASS RAIL	§	
HUNT COUNTY, TEXAS	§	
(TABC CASE NO. 601857)	§	ADMINISTRATIVE HEARINGS

### PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) alleged that the Brass Rail (Respondent), a private club, failed to provide regular food service adequate for its members and their guests. Staff sought to suspend Respondent's permit for 20 days, or alternatively, to require Respondent to pay a penalty of \$3,000. The Administrative Law Judge (ALJ) recommends that Respondent's permit be suspended for 20 days or that Respondent pay a penalty of \$3,000.

#### I. PROCEDURAL HISTORY & JURISDICTION

On February 11, 2003, Staff issued a notice of hearing (NOH) and served the NOH on Respondent by mailing the NOH by certified mail to Respondent's mailing address, as it appears in the Texas Alcoholic Beverage Commission (TABC) records. The NOH informed the Respondent that a hearing would be held concerning Staff's allegations and informed Respondent of the time and place of the hearing. The NOH was received at Respondent's address by one Steve Farley, who signed the certified mail return receipt.

On March 21, 2003, 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 Cathy Ward and Tim Kolacek. Ms. Ward and Mr. Kolacek stated that the Respondent did not receive the NOH, and that Steve Farley was unknown to them. Ms. Ward and Mr. Kolacek agreed to proceed with the hearing. The record closed on March 21, 2003.

#### II. DISCUSSION

##### A. Applicable Law

The TABC may suspend a private club registration permit if the club has failed to "provide regular food service adequate for its members and their guests." TEX. ALCO. BEV. CODE ANN. §§ 32.03(g); 32.17(a)(8)(Vernon 2003) (the Code); 16 TEX. ADMIN. CODE § 41.52 (c)(4), (e). The term "food service adequate for its members and their guests" means "that complete meals shall be available on the club premises for service to members, their families, and guests." 16 TEX. ADMIN. CODE (TAC) § 41.52 (e). "The statutory words . . . 'regular food service adequate for its members and their guests,' are words of general understanding . . . 'Complete' carries the idea of having the

necessary items of a meal and 'available' requires the meals to be reasonably obtainable on the club premises whether from a kitchen maintained by the club or by means of an established catering service." *Texas Liquor Control Board vs. The Attic Club, Inc.*, 457 S.W.2d 41, 45(Tex. 1970).

## B. Evidence

The TABC issued private club registration permit N246171 and beverage cartage permit PE246172 to Respondent. Respondent's permitted premises (the Brass Rail) are located at 1216 Interstate Highway 30, Greenville, Hunt County, Texas 75401.

TABC Agent Benney Brothers testified that he visited the Brass Rail on June 21, 2002, at approximately 7:15 p.m. Agent Brothers met with Melanie Acker, an employee of the Brass Rail. He was inspecting the Brass Rail to determine its food service. Ms. Acker showed Agent Brothers some packaged sandwiches she had purchased from Walmart for the Brass Rail. Ms. Acker indicated that members would not be charged if they wanted a sandwich. She told Agent Brothers there was no other food available for service, and that the sandwiches were not prepared on the premises.

Agent Brothers testified that he visited the Brass Rail on September 5, 2002, again inspecting the Brass Rail for food service. No food was available. Ms. Acker was present and told Agent Brothers the Brass Rail still utilized sandwiches from Walmart, but that she had not purchased any that day.

TABC Captain David Alexander testified. Captain Alexander described a meeting he had with Ms. Ward and Mr. Kolacek, in January 2000, after a warning had been issued to the Brass Rail concerning food service. He stated the principals of the Brass Rail were told:

- Meals had to be complete, *i.e.*, the meal must include an entree and side dishes.
- Meals had to be prepared on the premises or catered.
- Meals had to be regular, *i.e.*, when the club was open, although they could be restricted to regular mealtimes (lunch and dinner).
- Meals could not be prepackaged, such as frozen dinners.

Captain Alexander testified that the Walmart sandwiches did not comply with the requirement.

Agent Brothers reviewed the violation history included in TABC Exhibit No. 3. His testimony and a review of the document show a long history of administrative violations, including the January 2000 warning for failing to provide food service. Captain Alexander recommended a 20 day suspension of the Brass Rail's permits, or an alternative civil penalty of \$3,000.

## C. Analysis, Conclusion, and Recommendation

The evidence discloses a *per se* violation of the Code's requirements for food service.

Prepackaged sandwiches, without side dishes, are not within general understanding a complete meal. Purchasing sandwiches from a store is not using a catering service. On September 5, 2002, no food was available on the premises.

If the TABC is authorized to suspend a license under the Code, it is required to give the permittee an opportunity to pay a civil penalty instead. § 11.64(a) of the Code. This infraction does not appear on the Standard Penalty Chart. 16 TAC § 37.60(a). Generally, "the administrator or his designee is authorized to assess penalties for any violation of any of the foregoing statutes or rules for which a penalty is not provided on the chart. Any penalty assessed for a violation not provided for on the standard penalty chart shall be approved by either the chief of enforcement or the director of the regulatory division prior to its assessment." *Id.* § 37.60(e). The facts developed in the record are the determining factors "as to the sufficiency of the penalty assessed." *Id.* § 37.60(g). The amount of the penalty should bear some relationship to the economic impact a suspension would have on the permittee. The amount of the civil penalty may not be less than \$150 for each day of proposed suspension. § 11.64(a) of the Code.

The Code authorizes a 60 day suspension for this violation. The Brass Rail's administrative history shows one warning for failing to provide food service. The Brass Rail had a meeting with Captain Alexander in which the food service rules were explained. The Brass Rail was subsequently inspected and found to be in violation. A second inspection a few months later disclosed that the problem had not been corrected. A ten day suspension for each violation is reasonable under the total circumstances.

The ALJ recommends the TABC find Respondent failed to provide regular food service adequate for its members and their guests. The TABC should order that Respondent's permit be suspended for 20 days, or alternatively, that Respondent pay a \$3,000 civil penalty.

#### IV. PROPOSED FINDINGS OF FACT

1. The TABC issued private club registration permit N246171 and beverage cartage permit PE246172 to Respondent.
2. Respondent's permitted premises (the Brass Rail) are located at 1216 Interstate Highway 30, Greenville, Hunt County, Texas 75401.
3. On June 21, 2002, TABC Agent Benney Brothers made an inspection of the Brass Rail, arriving at approximately 7:15 p.m.
4. Agent Brothers met with Melanie Acker, an employee of the Brass Rail.
5. Agent Brothers inspected the Brass Rail to determine its food service.
6. Ms. Acker showed Agent Brothers some packaged sandwiches she had purchased from Walmart for the Brass Rail.

7. Ms. Acker indicated that members would not be charged if they wanted a sandwich; that there was no other food available for service; and that the sandwiches were not prepared on the premises.
8. On September 5, 2002, Agent Brothers visited the Brass Rail again inspecting the Brass Rail for food service. No food was available.
9. Ms. Acker was present and indicated the Brass Rail still utilized sandwiches from Walmart, but that she had not purchased any that day.
10. The Brass Rail did not provide complete meals because it did not offer an entree and side dishes.
11. The Brass Rail did not provide complete meals prepared on the premises or provided by an established catering service.
12. The Brass Rail did not provide regular meals, *i.e.*, when the club was open.
13. On October February 11, 2003, Staff issued a notice of hearing (NOH) and served the NOH on Respondent by mailing the NOH by certified mail to Respondent's mailing address, as it appears in the TABC records. 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.
14. On March 21, 2003, 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 TABC Legal Division. Respondent appeared through Cathy Ward and Tim Kolacek. The record closed on March 21, 2003.

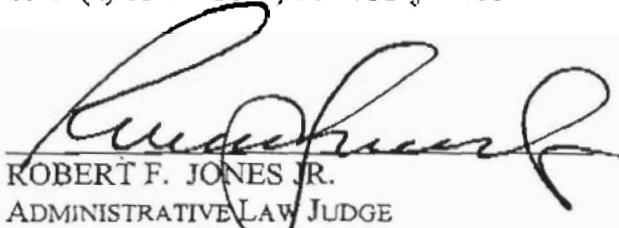
#### V. PROPOSED CONCLUSIONS OF LAW

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, which holds a private club registration permit,

failed to provide regular food service adequate for its members and their guests. §§ 32.03(g); 32.17(a)(8) of the Code; 16 TAC § 41.52 (c)(4), (e).

5. Based on the foregoing findings and conclusions, Respondent's permit should be suspended for 20 days, or alternatively, Respondent should pay a civil penalty of \$3,000. See §§ 32.03(g), 32.17(a)(8), 11.61(b)(2), & 11.64(a) of the Code; 16 TAC § 37.60.

SIGNED April 10, 2003.



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

**DOCKET NO. 601857**

IN RE THE BRASS RAIL	§	BEFORE THE
D/B/A THE BRASS RAIL	§	
PERMIT NOS. N-246171, PE246172	§	
	§	TEXAS ALCOHOLIC
	§	
HUNT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2059)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 5th day of May 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 March 21, 2003, and adjourned on March 21, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 10, 2003. 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. N-246171 and PE246172 will be **SUSPENDED**.

**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of **\$3,000.00** on or before the **18th** day of **June, 2003**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **twenty (20) days**, beginning at **12:01 A.M. on the 25th day of June, 2003**.

**This Order will become final and enforceable on May 26, 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 5th day of May, 2003.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

/bc

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

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**THE BRASS RAIL  
D/B/A THE BRASS RAIL  
RESPONDENT  
1216 IH 30  
Greenville, TX 75401  
CERTIFIED MAIL NO. 7001 2510 0003 8687 0543**

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Regulatory Division

Dallas District Office

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 601857**

**REGISTER NUMBER:**

**NAME: THE BRASS RAIL**

**TRADENAME: THE BRASS RAIL**

**ADDRESS: 1216 IH 30, Greenville, Hunt County, Texas 75401**

**DATE DUE: June 18, 2003**

**PERMITS OR LICENSES: N-246171, PE246172**

**AMOUNT OF PENALTY: \$3,000.00**

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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 18TH DAY OF JUNE 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.