

DOCKET NO. 605310

IN RE ELLIE DIAL MORALES, ET AL	§	BEFORE THE
D/B/A MORALES STOP AND SAVE	§	
PERMIT/LICENSE NOS. Q-486762,	§	
BF486763	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-1652)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of May, 2004, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge. The hearing convened on February 12, 2004, and adjourned on February 12, 2004. The Administrative Law Judge Tanya Cooper made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 4, 2004. 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. Petitioner filed exceptions on March 8, 2004.

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.

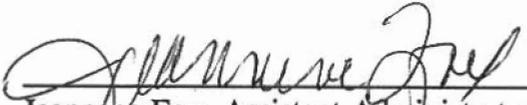
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations in the above-styled and numbered cause are hereby **DISMISSED** without prejudice.

This Order will become final and enforceable on June 17, 2004, 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 the 27th day of May, 2004, at Austin, Texas.

On Behalf of the Administrator,


Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX NO. (817) 377-3706

ELLIE DIAL MORALES, ET AL
d/b/a MORALES STOP AND SAVE
RESPONDENT
2801 Hemphill #101
Fort Worth, TX 76110-3215
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1903 4927

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Fort Worth District Office

SOAH DOCKET NO. 458-04-1652

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

BEFORE THE STATE OFFICE

MAR - 4 2004

V.

OF

ELLIE DIAL MORALES ET AL D/B/A
MORALES STOP AND SAVE, Respondent
Tarrant County, Texas
(TABC Case No. 605310)

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this enforcement action against Ellie Dial Morales et al d/b/a Morales Stop and Save (Respondent) alleging that Respondent or its agent, servant or employee, Herlinda Morales, or other persons possessed, delivered, or sold, or permitted others to possess, deliver, or sell equipment used or designed for administering a narcotic, crack pipes, on its licensed premises. This proposal for decision recommends that this matter be dismissed without prejudice because Respondent was not provided with notice of this proceeding.

I. JURISDICTION

TABC has jurisdiction and authority over this matter pursuant to Chapter 5 and §§ 6.01, 11.61, 61.71, and 104.01 of the Texas Alcoholic Beverage Code (the Code) and § 35.31 of the Texas Alcoholic Beverage Commission Rules (the Rules). TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.* and 16 TEX. ADMIN. CODE § 31.1 *et seq.* The State Office of Administrative Hearings (SOAH) has authority to conduct a hearing in this matter and make recommendations to TABC, including the issuance of a proposal for decision containing findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003 and § 5.43 of the Code.

II. PROCEDURAL HISTORY

Respondent is the holder of a Wine Only Package Store Permit, Q 486762, and a Beer Retailer's

SOAH DOCKET NO. 458-04-1652

PROPOSAL FOR DECISION

PAGE 2

Off Premises License, BF 486763, for a premises located at 2801 Hemphill #101, Fort Worth, Tarrant County, Texas. On December 16, 2003, TABC Staff issued notice of hearing in this matter to Respondent by certified mail, return receipt requested sent to Respondent's address listed above. TABC Staff's notice of hearing included 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 statutes and rules involved; and a short, plain statement of the matters asserted by TABC Staff.¹ The notice of hearing issued by TABC Staff advised that the hearing scheduled in this matter was to be held on February 12, 2004, at 10:30 a.m. at the State Office of Administrative Hearings, 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Tarrant County, Texas. TABC Staff's notice of hearing was returned to it by the U.S. Postal Service on December 29, 2003, with the notation, "Morales Stop & Save, Moved Left No Address, Unable to Forward, Return to Sender."

An Order Setting Hearing was also issued in this matter by SOAH. Respondent's copy of the Order was sent to its address listed above by regular mail. On December 29, 2003, Respondent's copy of that Order was returned to SOAH with the notation, "Morales Stop & Save, Moved Left No Address, Unable to Forward, Return to Sender."

A hearing was held on February 12, 2004, in Fort Worth, Texas, before Tanya Cooper, an administrative law judge (ALJ). TABC Staff appeared and was represented by Timothy E. Griffith, TABC Staff Attorney. Applicant did not appear and was not represented. TABC Staff presented evidence in support of its enforcement action against Respondent. Four exhibits and testimony from TABC Agent N. Hamilton were included in the record of this proceeding. TABC Staff requested that Respondent's permit and license be suspended for 12 days, or in lieu of any suspension, that Respondent pay a civil penalty in the amount of \$1,800. The record closed on that same date.

¹TEX. GOV'T CODE ANN. § 2001.052.

SOAH DOCKET NO. 458-04-1652

PROPOSAL FOR DECISION

PAGE 3

III. DISCUSSION

In a contested case, each party is entitled to an opportunity:

- (1) for hearing after reasonable notice of not less than 10 days; and
- (2) to respond and present evidence and argument on each issue involved in the case.²

In a proceeding relating to the suspension of a license, any suspension is not effective unless, before institution of the proceedings, the agency gives notice by personal service or by registered or certified mail to the license holder of facts or conduct alleged to warrant the intended action, and the license holder is given an opportunity to show compliance with all requirements of law for the retention of the license.³ Further, the Code also provides that notice of hearing shall be given to the license or permit holder, and may be served personally or sent by registered or certified mail addressed to the licensee or permittee.⁴

SOAH rules also require documents filed in a proceedings with SOAH to be served on all parties. Service of notice of hearing shall be made by the referring agency in the manner required by the APA (See TEX. GOV'T CODE ch. 2001). SOAH rules create a rebuttable presumption regarding a party's receipt of documents served by another party. If a document is sent by regular mail, certified mail, or registered mail, the ALJ shall presume that it was received not later than three days after mailing.⁵

Further, SOAH rules provide for disposition of contested cases on a default basis in the event a party who does not bear the burden of proof fails to appear on the day and time set for hearing. 1 TEX. ADMIN. CODE § 155.55. Section 155.55(c) allows for proving service of notice without showing actual

² TEX. GOV'T CODE ANN. § 2001.051.

³ TEX. GOV'T CODE ANN. § 2001.054

⁴ TEX. ALCO. BEV. CODE ANN. § 11.63.

⁵ 1 TEX. ADMIN. CODE § 155.25.

SOAH DOCKET NO. 458-04-1652

PROPOSAL FOR DECISION

PAGE 4

receipt by the defaulting party or defaulting party's agent, provided that the agency's statute or rules authorize service of notice of hearing by sending it to the party's last known address as shown by the referring agency's records. However, this manner for disposition is not available in this proceeding because TABC's statutes or rules do not provide for this type of notice delivery.

In this instance, the record shows that Respondent was not provided with any notice concerning these proceedings. Mail directed to Respondent by TABC Staff and SOAH was returned by the U.S. Postal Service undelivered, and therefore, the presumption for service of documents created in SOAH's rules is not applicable. In addition, a default decision is not an available remedy in this matter due to the lack of an alternative method of service of notice of hearing, other than actual notice, being provided for pursuant to the Code or Rules. As a result, the ALJ finds that no valid enforcement action can be taken concerning suspension of Respondent's permit or license without notice of this proceeding being provided to Respondent according to statutes and rules outlined in the discussion above. The ALJ recommends that this matter be dismissed without prejudice to TABC Staff

IV. FINDINGS OF FACT

1. Ellie Dial Morales et al d/b/a Morales Stop and Save (Respondent) is the holder of a Wine Only Package Store Permit, Q 486762, and a Beer Retailer's Off Premises License, BF 486763, for a premises located at 2801 Hemphill #101, Fort Worth, Tarrant County, Texas, issued by the Texas Alcoholic Beverage Commission (TABC).
2. On December 17, 2003, TABC Staff issued a notice of hearing alleging that Respondent, or its agent, servant or employee, Herlinda Morales or other persons possessed, delivered, or sold, or permitted others to possess, deliver, or sell equipment used or designed for administering a narcotic, crack pipes, on the licensed premises described in Finding of Fact No. 1.
3. In addition to the information described in Finding of Fact No. 2, TABC Staff's 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; and a reference to the particular sections of statutes and rules involved.
4. TABC Staff's notice of hearing was mailed to Respondent by certified mail, return receipt requested at the address listed on Respondent's permit and license and set out Finding of Fact No. 1.

SOAH DOCKET NO. 458-04-1652

PROPOSAL FOR DECISION

PAGE 5

5. The hearing was held as scheduled pursuant to TABC Staff's notice of hearing on February 12, 2004, in Fort Worth, Tarrant County, Texas, before Tanya Cooper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH). TABC Staff appeared and was represented by Timothy E. Griffith, Staff Attorney. Applicant did not appear.
6. Applicant did not receive TABC Staff's notice of hearing; it was returned by the U.S. Postal Service with the notation "Morales Stop & Save, Moved Left No Address, Unable To Forward, Return to Sender."

V. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Chapter 5 and §§ 6.01, 11.61, 61.71 and 104.01 TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. SOAH 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. Chapters 2001 and 2003, and 1 TEX. ADMIN. CODE § 155.1 *et seq.*
3. Notice of the hearing concerning TABC Staff's enforcement action against Respondent was not provided to Respondent as required pursuant to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.054, and TEX. ALCO. BEV. CODE ANN. § 11.63.
4. Based on the foregoing Findings of Fact and Conclusions of Law, the TABC Staff's enforcement action against Respondent should be dismissed without prejudice.

SIGNED 4th March 2004.



TANYA COOPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS