

DOCKET NO. 609058

IN RE BRENDA BERGER HOBBS	§	BEFORE THE
D/B/A MUSTANG SALLY'S CAFÉ	§	
PERMIT NOS. MB526313	§	
	§	TEXAS ALCOHOLIC
	§	
TARRANT COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-04-8610)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 12th day of November, 2004, 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 October 8, 2004, and adjourned on October 8, 2004. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 20, 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. 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.

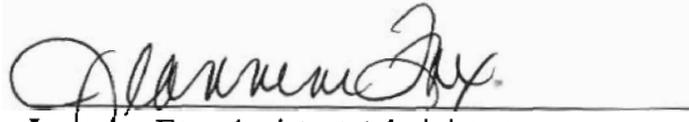
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the renewal of Permit No. MB526313 is hereby **DENIED**.

This Order will become final and enforceable on December 3, 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 12th day of November, 2004, at Austin, Texas.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Jeannene Fox", is written over a horizontal line. The signature is cursive and somewhat stylized.

**Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission**

TEG/bc

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

**BRENDA BERGER HOBBS
D/B/A MUSTANG SALLY'S CAFÉ
RESPONDENT
700 BEDFORD EULESS RD.
HURST, TX 76053-3967
CERTIFIED MAIL/RRR NO. 7000 1530 0003 1930 0091**

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

Licensing Division

Fort Worth District Office

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 20, 2004

Alan Steen, Administrator
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

Brenda Berger Hobbs
d/b/a Mustang Sally's Café
700 Bedford Euless Road
Hurst, Texas 76053-3967

VIA REGULAR MAIL

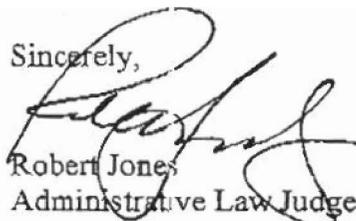
**RE: Docket No. 458-04-8610; Texas Alcoholic Beverage Commission vs Brenda Berger Hobbs
d/b/a Mustang Sally's Cafe (TABC Case No. 609058)**

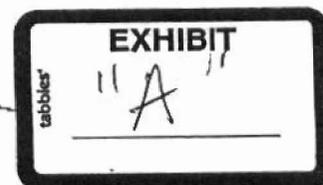
Dear Mr. Steen:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Timothy Griffith, attorney for Texas Alcoholic Beverage Commission, and to Brenda Berger Hobbs d/b/a Mustang Sally's Café, Respondent. The Staff of the Texas Alcoholic Beverage Commission (staff) sought non-renewal of Brenda Berger Hobbs d/b/a Mustang Sally's Café's (Respondent) mixed beverage permit. The Administrative Law Judge (ALJ) recommends the permit not be renewed.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,


Robert Jones
Administrative Law Judge



attachments

6777 Camp Bowie Blvd., Suite 400 ♦ Fort Worth, Texas 76116
(817) 731-1733 Fax (817) 377-3706
<http://www.suah.state.tx.us>

DOCKET NO. 458-04-8610**TEXAS ALCOHOLIC BEVERAGE
COMMISSION**§
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§**BEFORE THE STATE OFFICE****VS.****OF****BRENDA BERGER HOBBS D/B/A
MUSTANG SALLY'S CAFÉ
TARRANT COUNTY, TEXAS
(TABC CASE NO. 609058)****ADMINISTRATIVE HEARINGS****PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Staff) sought non-renewal of Brenda Berger Hobbs d/b/a Mustang Sally's Café's (Respondent) mixed beverage permit. The Administrative Law Judge (ALJ) recommends the permit not be renewed.

I. PROCEDURAL HISTORY

Notice and jurisdiction were not contested issues, and those matters are addressed only in the Findings of Fact and Conclusions of Law. Respondent filed a renewal application for her mixed beverage permit and food and beverage certificate. The Staff notified Respondent that she did not qualify for a food and beverage certificate and would have to provide the Texas Alcoholic Beverage Commission (TABC) a conduct surety bond for her permit to be renewed. When Respondent did not file a conduct surety bond, the TABC denied Respondent's renewal. Respondent requested a hearing which was referred to the State Office of Administrative Hearings (SOAH). On October 8, 2004, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent represented herself. The record was closed on October 8, 2004.

II. DISCUSSION

A. Applicable Law

The holder of a mixed beverage permit is required to post a conduct surety bond.¹ If issued a food and beverage certificate by the TABC,² the permittee is exempted from the Code's conduct surety bond requirement.³ When the holder of the permit and certificate seeks renewal of the permit, a certification from the state comptroller's office that the holder's gross receipts for mixed beverage sales are 50 percent or less of her total gross receipts is required.⁴ If the comptroller does not certify that the holder is in compliance, the TABC "may not renew the certificate."⁵ In the absence of a certificate, the mixed beverage permit holder must file a conduct surety bond, and without a bond, the mixed beverage permit may not be renewed.⁶

B. Evidence

The TABC issued mixed-beverage permit MB526313 and food and beverage certificate FB 526314 to Respondent. Respondent's licensed premises are located at 700 Bedford Euless Road, Hurst, Tarrant County, Texas. Respondent did not post a conduct surety bond. The permit and certificate expired on November 17, 2003.⁷

¹ TEX. ALCO. BEV. CODE ANN. § 11.11(a)(1) (Vernon 2004) (the Code). This section requires a conduct surety bond for permits issued under Chapter 28 of the Code. Chapter 28 authorizes the TABC to issue mixed beverage permits. § 28.01 of the Code.

² § 28.18(a) of the Code requires that a permittee's "gross receipts of mixed beverages sold by the holder [be] 50 percent or less of the total gross receipts from the premises" to qualify for a food and beverage certificate.

³ § 28.18(f) of the Code.

⁴ § 28.18(d) of the Code.

⁵ *Id.*

⁶ § 11.61(b)(2) of the Code.

⁷ A certificate expires on the expiration of the primary mixed beverage permit. § 28.18(e) of the Code.

Docket No. 458-04-8610

Proposal for Decision

Page 3

On November 5, 2003, Respondent filed renewal applications for the permit and the certificate. The renewal applications listed Respondent's alcoholic beverage sales for the "last year of operation" to be \$25,558 and her food sales to be \$31,455. These figures were taken from Respondent's cash register tapes. The Staff requested a certification of Respondent from the comptroller's office in October 2003. The comptroller refused to certify Respondent, asserting its records showed (as of October 3, 2003) Respondent's alcoholic beverage sales to be \$29,248 and her food sales to be \$25,6254. The figures used by the comptroller were taken from Respondent's reports to the comptroller. At the hearing, Respondent submitted revised figures: alcoholic beverage sales of \$31,277 and food sales of \$31,393.

C. Discussion

The Code specifies that if "the comptroller does not certify that the holder is in compliance . . . the commission may not renew the certificate."⁸ The words "may not" impose a "prohibition and [are] synonymous with 'shall not.'"⁹ Since the comptroller did not certify Respondent, the TABC may not renew Respondent's food and beverage certificate. It follows that Respondent was required to file a conduct surety bond, which she has not done.

Therefore, the ALJ recommends Respondent's mixed beverage permit not be renewed.

III. FINDINGS OF FACT

1. The Texas Alcoholic Beverage Commission (TABC) issued mixed-beverage permit MB526313 and food and beverage certificate FB 526314 to Brenda Berger Hobbs d/b/a Mustang Sally's Café (Respondent).
2. Respondent's licensed premises are located at 700 Bedford Euless Road, Hurst, Tarrant County, Texas.

⁸ § 28.18(d) of the Code.

⁹ TEX. GOV'T CODE ANN. § 311.016(5)(Vernon 2004).

Docket No. 458-04-8610

Proposal for Decision

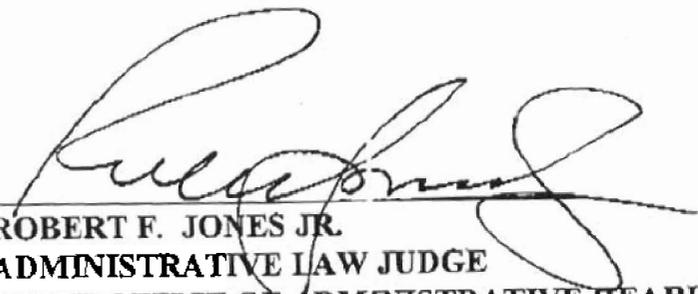
Page 4

3. Respondent did not post a conduct surety bond.
4. The permit and certificate expired on November 17, 2003
5. On November 5, 2003, Respondent filed renewal applications for the permit and the certificate
6. The Staff of the TABC requested a certification of Respondent's receipts from the comptroller's office in October 2003.
7. The comptroller refused to certify Respondent because Respondent's alcoholic beverage sales were \$29,248 and her food sales were \$25,6254.
8. Respondent's gross receipts for mixed beverage sales were not 50 percent or less of her total gross receipts.
9. On January 7, 2004, Staff sent Respondent written notice that she did not qualify for a food and beverage certificate and would be required to provide the TABC a conduct surety bond in order for her renewal application to be approved.
10. On February 3, 2004, the TABC issued an order finding that Respondent had not filed a conduct surety bond and denied Respondent a renewal of her mixed beverage permit.
11. Respondent filed a request for a hearing which was referred to the State Office of Administrative Hearings (SOAH).
12. On September 3, 2004, the Staff of the TABC (Staff) served its Notice of Hearing (NOH) on Respondent.
13. The NOH made reference to the legal authority and jurisdiction under which the hearing was to be held, referenced the particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.
14. On October 8, 2004, a hearing convened before ALJ Robert F. Jones Jr. at the SOAH Fort Worth office located at 6777 Camp Bowie Boulevard, Suite 400, Fort Worth, Tarrant County, Texas. Staff was represented by Timothy Griffith, an attorney with the TABC Legal Division. Respondent represented herself. The record was closed on October 8, 2004.

IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to Chapter 5 of the Texas Alcoholic Beverage Code (the Code).
2. The State Office of Administrative Hearings 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 2004).
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 2004).
4. Based on the foregoing findings and conclusions, Respondent has not qualified for renewal of a mixed beverage permit. § 11.11(a)(1) of the Code.
5. Based on the foregoing findings and conclusions, Respondent's mixed beverage permit should not be renewed. § 11.61(b)(2) of the Code.

SIGNED October 20, 2004.



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