

**DOCKET NO. 596114**

IN RE JIMMY LU'S	§	BEFORE THE
D/B/A JIMMY LU'S	§	
PERMIT NOS. N-476037, NL476038,	§	
PE476039, FB476040	§	TEXAS ALCOHOLIC
	§	
COLLIN COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1149)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 10th day of April 2002, 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 February 21, 2002 and adjourned on February 21, 2002. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on March 12, 2002. 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-476037, NL476038, PE476039 and FB476040 are herein **SUSPENDED** for five (5) days.

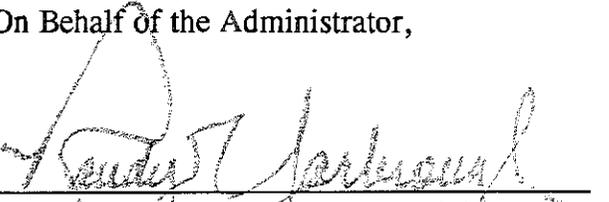
**IT IS FURTHER ORDERED** that unless the Respondent pays a civil penalty in the amount of \$750.00 on or before the 12<sup>th</sup> day of June, 2002, all rights and privileges under the above described permits will be **SUSPENDED** for a period of five (5) days, beginning at 12:01 A.M. on the 19<sup>th</sup> day of June, 2002.

This Order will become final and enforceable on May 1, 2002, 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 10<sup>th</sup> day of April, 2002.

On Behalf of the Administrator,



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Randy Yarbrough, Assistant Administrator  
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Tanya Cooper  
Administrative Law Judge  
State Office of Administrative Hearings  
VIA FACSIMILE (817) 377-3706

Jimmy Lu's  
d/b/a Jimmy Lu's  
**RESPONDENT**  
17727 Dallas Parkway, Ste. 160  
Dallas, Texas 75287-7316  
VIA CERTIFIED MAIL NO. 7001 2510 0000 7278 9869

Timothy E. Griffith  
ATTORNEY FOR PETITIONER  
TABC Legal Section

Licensing Division  
Dallas District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 596114

REGISTER NUMBER:

NAME: JIMMY LU'S

TRADENAME: JIMMY LU'S

ADDRESS: 17727 Dallas Parkway, Suite 160, Dallas, Texas 77287-7316

DATE DUE: June 12, 2002

PERMITS OR LICENSES: N-476037, NL476038, PE476039, FB476040

AMOUNT OF PENALTY:

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 12TH, DAY OF JUNE, 2002, 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.

DOCKET NO. 458-02-1149

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

V.

JIMMY LU'S  
D/B/A JIMMY LU'S  
DALLAS COUNTY  
(TABC CASE NO. 596114)§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Respondent, Jimmy Lu's, alleging that Respondent operated its licensed premises as an open saloon<sup>1</sup>. TABC Staff requests a five-day suspension of Jimmy Lu's permits, or a civil penalty of \$750.00, in lieu of any suspension of Respondent's permits. This proposal finds that the allegation against Respondent is true. The Administrative Law Judge (ALJ) recommends the penalty sought by Staff.

**I. PROCEDURAL HISTORY**

On September 18, 2001, TABC Staff provided Respondent with notice of the alleged open saloon violation, and of its intention to seek a penalty for this violation. Respondent requested a hearing. This matter was referred to the State Office of Administrative Hearings (SOAH) to conduct the requested hearing. On December 31, 2001, TABC Staff issued a Notice of Hearing notifying all parties of the requested hearing. TABC Staff's Notice of Hearing was sent to Respondent at the address maintained within its records for the licensed premises. This Notice was returned to TABC Staff by the U.S. Postal Service as "unclaimed." The Notice's envelope documented that several attempts were made to deliver Respondent this information concerning his requested hearing.

The ALJ also issued prehearing orders in this case informing the parties of the hearing's date, time, and location, and requiring certain information from both parties in order to conduct the hearing in an efficient manner. TABC Staff complied with all requirements for participation in the hearing.

SOAH's correspondence to Respondent was directed to the address of the licensed premises via the U.S. Postal Service. This letter was also returned to SOAH by the U.S. Postal Service with a notation on its envelope as "moved, left no address, unable to forward."

<sup>1</sup>The term "open saloon" means any place where an alcoholic beverage is sold or offered for sale for beverage purposes by the drink or in broken or unsealed containers, or a place where any alcoholic beverage is sold or offered for sale for on-premises consumption. TEX. ALCO. BEV. CODE ANN. § 32.17(b).

On February 5, 2002, the ALJ issued a Continuance Order to the parties because weather conditions had made travel in the area hazardous. This Order rescheduled the hearing date until February 21, 2002 and was delivered to the parties. Respondent's copy of the Order was sent via regular mail through the U.S. Postal Service. The letter containing Respondent's copy of the Order was not returned to the SOAH offices by the Postal Service and is presumed to have been delivered to Respondent.

On February 20, 2002, TABC Staff filed a Motion for Summary Disposition and in support of its Motion filed certified copies of Respondent's TABC licensing records, an Affidavit of Beth Gray, and a copy of its Requests for Admissions, Interrogatories and Requests for Production served to Respondent at the licensed premises' address. Respondent did not file any responses to TABC Staff's discovery requests.

A hearing convened as scheduled on February 21, 2002, at the SOAH offices in Dallas, Dallas County, Texas. ALJ Tanya Cooper presided and TABC Staff appeared at the hearing through its attorney, Timothy Griffith. Respondent did not appear at the hearing. Staff's attorney requested that its Motion for Summary Disposition, previously filed with SOAH on February 20, 2002, be granted.

## II. DISCUSSION

### A. Applicable Law

In reference to the alleged violation, a holder of a private club registration permit commits a violation if the holder or its agent, servant, or employee permits a person who is not a guest or member to consume an alcoholic beverage on club premises.<sup>2</sup>

SOAH's procedural rules provide for summary disposition in certain cases. This rule allows an ALJ

[i]n response to a party's motion . . . [to] issue a proposal for decision, or where authorized by law a final order, resolving a contested case without evidentiary hearing if the pleadings, affidavits, materials obtained by discovery, admissions, matters officially noticed, stipulations, or evidence of record shows there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE § 155.57(a).

A moving party bears the burden in the summary judgment proceeding. TABC Staff must plead and conclusively establish each element of its claim. Once TABC Staff establishes its right to summary judgment, the burden then shifts to the Respondent to present information that would preclude summary judgment. *See Ward v. Emmett*, 37 S.W.3d 500, 501-02 (Tex.App.-San Antonio

<sup>2</sup>TEX. ALCO. BEV. CODE ANN. §§ 32.01(a)(2) 32.17(a)(1), and 32.17(a)(8)(b).

2001).

### B. Evidence

The ALJ took official notice of the contents of the SOAH file in this matter. The SOAH file included the following: the Notice of Hearing issued to Respondent by TABC Staff; certified copies of Respondent's permits containing the licensed premises' address of record and Respondent's licensing history; TABC Staff's Requests for Admissions, Interrogatories and Requests for Production served on Respondent; and an affidavit from Beth Gray, a TABC agent, who has personal knowledge concerning the facts surrounding the violation alleged by TABC Staff.

Respondent is the holder of the following permits issued by TABC: Private Club Registration Permit N476037, Beverage Cartage Permit PE476039, and Food and Beverage Certificate FB476040. The licensed premises is located at 17727 Dallas Parkway, Suite 160, Dallas, Collin County, Texas. Respondent's mailing address is the same as the licensed premises' location.

The affidavit of Beth Gray, a TABC Agent, states that she was at the licensed premises on June 21, 2001. She took a seat at the bar and ordered a Miller Lite Beer. She was served this beer by the bartender, Darren Smith. Mr. Smith accepted \$3.00 from Agent Gray in payment for the beer. Agent Gray confirmed that the beverage given her by the bartender was an alcoholic beverage, beer, by her sight, smell, and taste, along with the container's labeling.

At that time, Agent Gray was not a member of the licensed premises, Jimmy Lu's. She was not a temporary member, the guest of a member of the licensed premises, or in the presence of a family member who was a member of the licensed premises.

### C. Analysis, Conclusion, and Recommendation

TABC Staff has established its right to summary disposition. Notice was provided to Respondent of the requested hearing at the address of record for the permit holder. The Notice of Hearing satisfies pleading requirements. Paragraph I of the Notice set out the issues defined by statute. Delivery of the Notice of Hearing was attempted at the address of record for the licensed premises by the U.S. Postal Service, but the Notice was unclaimed by Respondent. Respondent did not claim this Notice after several attempts were made to deliver it.

Based upon the documents filed in this matter by TABC's Staff, Respondent's employee served an alcoholic beverage on the licensed premises to a person who was not a member of Respondent's private club, Jimmy Lu's. Further, the person served was not a temporary member, guest of a member, or in the presence of a family member who was a member of the club.

As a result, the burden of proof shifts to Respondent to present evidence that precludes summary disposition. *Ward* at 502. Respondent requested a hearing from the TABC Staff concerning the alleged violation, but did not claim any documents pertaining to this matter after

making the hearing request. Respondent has presented no affidavits either questioning the veracity of the TABC Staff's proof or raising a fact issue. Respondent did not respond in any manner to TABC Staff's discovery requests. Respondent did not appear at the hearing to contest any portion of TABC Staff's case. The ALJ concludes that the pleadings, affidavits, admissions, matters officially noticed, and evidence of record show there is no genuine issue as to any material fact and that TABC Staff is entitled to a decision in its favor.

### III. PROPOSED FINDINGS OF FACTS

1. The Texas Alcoholic Beverage Commission (TABC) issued Respondent, Jimmy Lu's, the following permits: Private Club Registration Permit N476037, Beverage Cartage Permit PE476039, and Food and Beverage Certificate FB476040. These permits are for the licensed premises located at 17727 Dallas Parkway, Suite 160, Dallas, Collin County, Texas.
2. On December 31, 2001, TABC Staff issued a Notice of Hearing to Respondent at its address of record. Delivery of the Notice was attempted three times by the U.S. Postal Service, but was returned to TABC Staff by the Postal Service after Respondent failed to claim the Notice.
3. TABC Staff's Notice of Hearing provided 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 conducted; references to particular sections of statutes and rules involved; and a short, plain statement of the matters asserted.
4. Respondent did not appear at the hearing, or in any way challenge the sufficiency of notice, jurisdiction, or evidence presented in support of TABC Staff's Motion for Summary Disposition.
5. Staff requested this matter be disposed of by summary disposition.
6. On June 21, 2001, Respondent's employee, a bartender identified as Darren Smith, sold an alcoholic beverage, beer, to a TABC Agent, Beth Gray.
7. Agent Gray was not a member of the private club, Jimmy Lu's; nor was she a temporary member; a guest of a member; or in the presence of a family member who was a member of the private club, Jimmy Lu's.

### IV. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2), 32.01, and 32.17.
2. 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 findings of facts and conclusions of law, pursuant to TEX. GOV'T CODE ANN. §§ 2003.021 and

2003.042.

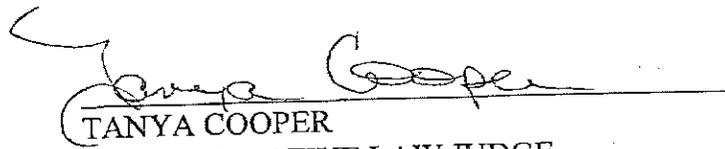
3. Notice of this proceeding and hearing was sufficient. TEX. GOV'T CODE ANN. §§ 2001.051, 2001.052, and 2001.054, 1 TEX. ADMIN. CODE §§ 155.25 and 155.27.

4. Based on the foregoing findings and conclusions, there is no genuine issue as to any material fact and Staff is entitled to a decision in its favor as a matter of law.

5. Based on the foregoing findings and conclusions, Respondent committed a violation of TEX. ALCO. BEV. CODE §§ 11.61, 32.17(a)(1), and 32.17(a)(8) and 32.17(b).

6. Based on the foregoing findings and conclusions, Respondent's permits should be suspended for five days, or in lieu of suspension, Respondent should be allowed to pay a civil penalty in the amount of \$750.00.

SIGNED on the 12<sup>th</sup> day of March 2002.



TANYA COOPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS