

under TEX. GOV'T CODE ANN. ch. 2001 and TEX. ALCO. BEV. CODE ANN. § 5.43.

On July 11, 2006, TABC issued a Notice of Hearing to Respondent at its mailing address of record reflected on Respondent's permits. The Notice of Hearing was sent by U.S. Post Office certified mail, return receipt requested. TABC proffered into evidence the U.S. Post Office's return receipt "green card" number 7001 2510 0000 7275 0395. Furthermore, Notice of Hearing is presumed to have been received² at Respondent's address of record pursuant to 16 TAC § 37.3,³ based upon the Certificate of Service included in TABC Staff's Notice of Hearing that was filed with SOAH in this matter on July 31, 2006.

The initial hearing date scheduled in this case through TABC's Notice of Hearing was August 7, 2006, at 10:00 a.m. On August 4, 2006, Respondent's attorney Sergio Gonzalez filed an Entry of Appearance and an Unopposed Motion for Continuance. Thereafter, on August 7, 2006, the ALJ issued Order Granting Respondent's First Motion for Continuance. The hearing was set for 10:00 a.m. Mountain Daylight Time, on August 28, 2006. Notice of the date change was provided to both parties via their respective facsimile numbers of record. SOAH's facsimile report

² 1 TEX. ADMIN. CODE (TAC) § 155.25 provides that any person filing a document with SOAH in a case shall, on the same date as the document is filed, provide a copy to each party. . . by regular, certified or registered mail.

...

(d) Presumed time of receipt of served documents. The following rebuttable presumptions shall apply regarding the party's receipt of documents served by another party:

...

(3) If a document was sent by regular mail, certified mail, or registered mail, the judge shall presume that it was received no later than three days after mailing.

3

TABC's Rule 37.3 provides that service of notices of hearing, . . . related to contested cases shall be by certified mail addressed to the licensee/permittee/certificate holder's last known address as reflected in the commission's records. A certificate of service to such address shall be *prima facie* evidence of adequate service on the licensee/permittee/certificate holder. This rule further requires that licensee/permittee/certificate holders and applicants for licenses, permits, or certificates, and their representatives, shall notify the commission in writing of any change of address within seven days of such change. Licensee/permittees shall file their change of address with the Licensing Division of the Texas Alcoholic Beverage Commission.

indicates that such notice was received at Mr. Gonzalez' office on August 7, 2006.

A hearing was convened as scheduled before ALJ Veronica S. Najera at the SOAH El Paso Regional Office, located at the State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas, on August 28, 2006. TABC was represented at the hearing by Judith L. Kennison, a TABC Staff Attorney. Respondent did not appear and was not represented at the hearing. During the hearing, TABC Staff offered evidence to support a default decision against Respondent. The hearing concluded and the record closed on that same day.

II. ANALYSIS

Based on Respondent's failure to appear at the hearing, TABC requested that the default provisions of 1 TAC § 155.55 be invoked. TABC's Notice of Hearing complies with 1 TAC §§ 155.27 and 155.55, and TEX. ALCO. BEV. CODE. ANN. § 11.63. Pursuant to 1 TAC § 155.55, the allegations presented in the Notice of Hearing are deemed admitted as true. Accordingly, the ALJ incorporates these allegations into the Findings of Fact below.

Further, TABC seeks a four-day suspension, or in lieu of the suspension, Respondent shall pay \$600.00 for the issuance of one dishonored check in the amount of \$483.10 in May 28, 2004. The ALJ agrees that TABC's penalty recommendation is appropriate. Section 61.73(b) of the Texas Alcoholic Beverage Code authorizes the commission or administrator to cancel or deny a permit for the retail sale of alcoholic beverage if it is found that the licensee gave a check as full or partial payment which is dishonored when presented for payment. Based upon the above-listed Code provision and Respondent's failure to appear at the hearing as scheduled, a four-day suspension, or a \$600.00 civil penalty, is recommended.

III. FINDINGS OF FACT

1. Martina Barba d/b/a Rafa's Bar (Respondent) holds a Wine and Beer Retailer's On Premise Permit, issued by TABC under number BG-512382, for the premises located at 914 S. Stanton Street, El Paso, Texas 79901.
2. On July 11, 2006, the TABC issued a Notice of Hearing to Respondent at its mailing address

of record reflected on Respondent's permits: 914 S. Stanton Street, El Paso, Texas 79901. This Notice was sent by U.S. Post Office certified mail, return receipt requested. The "green card" no. 7001 2510 0000 7275 0395 was returned to TABC with signature indicating receipt.

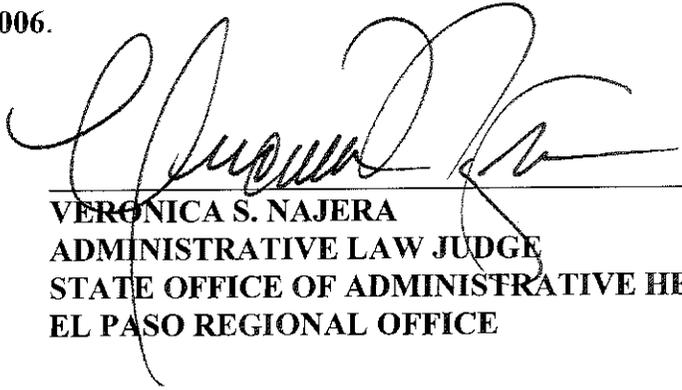
3. The Notice of Hearing contained a statement of the time, place and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a statement of the matters asserted.
4. The Notice of Hearing properly disclosed in at least twelve-point, bold-face type that upon Respondent's failure to appear at the hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought may be granted by default.
5. On August 28, 2006, a hearing was convened before ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office, located in the State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas. TABC was represented at the hearing by Judith L. Kennison, a TABC Staff Attorney. Respondent did not appear and was not represented at the hearing.
6. On or about May 28, 2004, Respondent issued a check or draft in the amount of \$483.10 for the purchase of beer that was dishonored when presented for payment.

IV. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating 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. 2001 and TEX. ALCO. BEV. CODE ANN. § 5.43.
3. Based upon Findings of Fact Nos. 2-4, TABC issued its Notice of Hearing in compliance with 1 TEX. ADMIN. CODE (TAC) §§ 155.27 and 155.55 and TEX. ALCO. BEV. CODE ANN § 11.63.
4. Based upon Findings of Fact Nos. 2-5, the hearing proceeded on a default basis as authorized by 1 TAC § 155.55.
5. Based upon Finding of Fact No. 6, Respondent violated TEX. ALCO. BEV. CODE ANN § 102.31.

6. Based upon Findings of Fact Nos. 1-6, Conclusion of Law No. 5, and TEX. ALCO. BEV. CODE ANN. § 61.73, Respondent's permits should be suspended for a period of four days, or in lieu of the suspension, Respondent shall pay a \$600.00 civil penalty.

SIGNED OCTOBER 17, 2006.



**VERÓNICA S. NAJERA
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
EL PASO REGIONAL OFFICE**