

DOCKET NO. 617642

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
	§	
H & A GROUP INC. D/B/A JUMPIN JOHN'S, Respondent	§	ALCOHOLIC
	§	
	§	
PERMIT/LICENSE BQ704666	§	
	§	
MCLENNAN COUNTY, TEXAS (SOAH DOCKET NO. 458-13-5153)	§	BEVERAGE COMMISSION

ORDER AFTER REMAND

CAME ON FOR CONSIDERATION this 20th day of October, 2015, the above-styled and numbered cause.

On July 9, 2013 Petitioner filed a Notice of Hearing indicating that this case would be heard by the State Office of Administrative Hearings on October 3, 2013. On August 23, 2013 Petitioner filed a Motion for Summary Disposition under 1 Texas Administrative Code §155.505. Included with the Motion when filed were Petitioner's exhibits, in accord with 1 Texas Administrative Code §155.505(d). On August 29, 2013 Administrative Law Judge Tanya Cooper issued Prehearing Order No. 2 requiring Petitioner to amend the Motion to comply with the notice requirement of 1 Texas Administrative Code §155.505(b)(4). In response, on August 30, 2013 Petitioner filed the First Amended Motion for Summary Disposition, which includes the required notice. Petitioner's exhibits were not re-filed with the First Amended Motion, but were subsequently re-filed on September 17, 2013.

On September 27, 2013 Administrative Law Judge Cooper issued Prehearing Order No. 3, cancelling the scheduled October 3, 2013 hearing to allow time to review Petitioner's Motion and decide if a hearing was necessary, since 1 Texas Administrative Code §155.505(e)(1) allows an Administrative Law Judge to hold a hearing on a Motion for Summary Disposition or rule on it without a hearing.

On October 2, 2013 Respondent's Attorney submitted "Respondent's Original Answer" in the nature of a general denial. The Answer was received by Petitioner's Attorney in the mail on October 7, 2013. The Proposal for Decision indicates that Petitioner received it by electronic mail on October 2, 2013 but that it was never filed with the State Office of Administrative Hearings. In any event, if the "Original Answer" was intended as a response to the Motion for Summary Disposition it was well outside of the 14-day response period set forth in 1 Texas Administrative Code §155.505(c)(1) and lacked the requirements of 1 Texas Administrative Code §155.505(c)(2).

In Prehearing Order No. 4 Administrative Law Judge Cooper on November 4, 2013 reassigned the case to Administrative Law Judge Jeremy A. Valdez. On October 3, 2014 Administrative Law Judge Valdez made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law. The 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. Respondent's attorney was not served with the Proposal for Decision. No exceptions were filed.

On April 20, 2015, I issued an Order cancelling Respondent's permit. The Order adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the October 3, 2014 Proposal for Decision and incorporated those Findings of Fact and Conclusions of Law into the Order, as if such were fully set out and separately stated therein.

Respondent filed a Motion for Rehearing on May 7, 2015. On June 4, 2015, I issued an Order Granting Motion for Rehearing and Remanding to the State Office of Administrative Hearings to allow an opportunity for Respondent's attorney to file exceptions to the Proposal for Decision. On July 7, 2015, Respondent's attorney filed a letter indicating that no exceptions were filed.

Therefore, by this Order I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the October 3, 2014 Proposal for Decision and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent's Wine and Beer Retailer's Off-Premise Permit No. BQ704666 is hereby **CANCELLED**.

This Order will become final and enforceable on the 13th day of November, 2015, unless a Motion for Rehearing is filed by the 12th day of October, 2015.

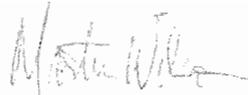
SIGNED this the 20th day of October, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 20th day of October, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Jeremy A. Valdez
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512) 322-2061

H & A Group Inc.
d/b/a Jumpin John's
RESPONDENT
3130 N. 18th Street
Waco, TX 76708-2068
VIA FIRST CLASS MAIL, CMRRR # 70090960000121491186

William F. Brown
ATTORNEY FOR RESPONDENT
210 North Sixth Street
Waco, Texas 76701
VIA FIRST CLASS MAIL, CMRRR # 70090960000121491179
AND VIA FACSIMILE: (254) 756-2193

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: judith.kennison@tabc.texas.gov

On October 2, 2013 Respondent's Attorney submitted "Respondent's Original Answer" in the nature of a general denial. The Answer was received by Petitioner's Attorney in the mail on October 7, 2013. The Proposal for Decision indicates that Petitioner received it by electronic mail on October 2, 2013 but that it was never filed with the State Office of Administrative Hearings. In any event, if the "Original Answer" was intended as a response to the Motion for Summary Disposition it was well outside of the 14-day response period set forth in 1 Texas Administrative Code §155.505(c)(1) and lacked the requirements of 1 Texas Administrative Code §155.505(c)(2).

In Prehearing Order No. 4 Administrative Law Judge Cooper on November 4, 2013 reassigned the case to Administrative Law Judge Jeremy A. Valdez. On October 3, 2014 Administrative Law Judge Valdez made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law. The 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. Respondent's attorney was not served with the Proposal for Decision, presumably because of Administrative Law Judge Valdez's determination that Mr. Brown had never filed a pleading with or otherwise participated in this case at the State Office of Administrative Hearings. No exceptions were filed.

After review and due consideration of the Proposal for Decision, I adopt the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained therein and incorporate those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent's Wine and Beer Retailer's Off-Premise Permit No. BQ 704666 is hereby **CANCELLED**.

This Order will become final and enforceable on the 15th day of May, 2015, unless a Motion for Rehearing is filed by the 14th day of May, 2015.

SIGNED this the 20th day of April, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 20th day of April, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Jeremy A. Valdez
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Catherine Chamblee
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Catherine.chamblee@tabc.texas.gov

On July 9, 2013, Staff issued a notice of hearing directed to Respondent at its address of record. The notice 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 short, plain statement of the matters asserted, as required by Texas Government Code § 2001.052.

On August 30, 2013, Staff timely filed its First Amended Motion for Summary Disposition, asserting there were no material facts in dispute and that it was entitled to a decision in its favor as a matter of law. The motion stated the material facts upon which the motion was based, and included supporting summary disposition evidence in seven attached exhibits.¹ Additionally, the motion's first page contained the following statement in at least 12-point, bold-face type: "Notice to parties: This motion requests the judge to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 14 days after you received this motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits. See SOAH's rules at 1 Texas Administrative Code § 155.505. These rules are available on SOAH's public website." Respondent did not file a timely response to Staff's motion.² Based on the pleadings submitted, the ALJ will consider this proceeding under the provisions of 1 Texas Administrative Code § 155.505(a).³

¹ Pet. Exs. 1(a), 1(b), 2, 3, 4, 5 and 6.

² In a letter dated March 20, 2014, Staff included a document titled "Respondent's Original Answer" which was sent to Staff via electronic mail on October 2, 2013. The ALJ has determined that Respondent never filed the answer with SOAH.

³ Summary disposition shall be granted on all or part of a contested case if the pleadings, the motion for summary disposition, and the summary disposition evidence show that 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 on all or some of the issues expressly set out in the motion. Summary disposition is not permitted based on the ground that there is no evidence of one or more essential elements of a claim or defense on which the opposing party would have the burden of proof at hearing. 1 Tex. Admin. Code § 155.505(a).

II. APPLICABLE LAW

In its Notice of Hearing, Staff cited the following statutes as grounds for cancelling Respondent's permit:

Texas Alcoholic Beverage Code § 11.61(b)(3), (7):

CANCELLATION OR SUSPENSION OF PERMIT. (b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:[...] (3) the permittee was finally convicted of a felony while holding an original or renewal permit;[...] (7) the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency[.]

Texas Alcoholic Beverage Code § 61.71(a)(3), (17):

GROUND FOR CANCELLATION OR SUSPENSION:
RETAIL DEALER. (a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:[...] (3) was finally convicted of a felony while holding an original or renewal license;[...] (17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people[.]

Based on a review of the pleadings, the following statutes are also relevant to the legal issues in this case:

Texas Alcoholic Beverage Code § 61.02 states that "a license issued under this code is a purely personal privilege and is subject to revocation as provided in this code."

Texas Alcoholic Beverage Code § 61.71(c) states that with one exception not applicable in this case, the grounds listed in subsection (a) of that section “also apply to each member of a partnership or association and, as to a corporation, to the president, manager, and owner of the majority of the corporate stock.”

Texas Alcoholic Beverage Code § 26.03(b) states that the provisions of the Alcoholic Beverage Code “applicable to the cancellation and suspension of a retail dealer’s off-premise license also apply to the cancellation and suspension of a wine and beer retailer’s off-premise permit.”

III. UNDISPUTED FACTS

Hassan Rajab Ahmad is Respondent’s president, secretary, director, and sole stockholder. TABC issued Respondent’s original Wine & Beer Retailer’s Off-Premise Permit (No. BQ704666) on September 26, 2008. Respondent operated an alcoholic beverage business known as Jumpin John’s located at 3130 N 18th Street in Waco, McClennan County, Texas.⁴

On March 31, 2010, Ahmad signed a Settlement Agreement and Waiver of Hearing acknowledging that Respondent’s business violated Texas Alcoholic Beverage Code § 11.61(b)(7). The settlement concerned an administrative violation that occurred on September 18, 2009. As a result, Respondent paid a civil penalty of \$900 in lieu of a three-day suspension of its permit.⁵

On August 25, 2010, Ahmad signed a Settlement Agreement and Waiver acknowledging that Respondent was responsible for an administrative violation related to gambling on June 10,

⁴ Pct. Ex. 1(a) at 2, 12.

⁵ *Id.* at 6-9.

2010. As a result of this violation, Respondent paid a civil penalty of \$5,400 in lieu of an eighteen-day suspension of its permit.⁶

Respondent's permit was renewed on September 26, 2011, with an expiration date of September 25, 2013.⁷

On January 14, 2013, Ahmad pled guilty to possession of a controlled substance with intent to distribute, a second-degree felony in violation of Texas Health and Safety Code § 481.1161. On the same date, Ahmad was convicted and sentenced to two years of confinement in the Texas Department of Criminal Justice Institutional Division.⁸

IV. ANALYSIS

Staff asserts two grounds for cancellation of Respondent's permit. First, Staff seeks cancellation of the permit because Mr. Ahmad was finally convicted of a felony while Respondent held an original or renewal permit. Second, Staff asserts that cancellation is also appropriate because Mr. Ahmad's conviction establishes that Respondent conducted its business in a place or manner which warrants cancellation based on the general welfare, health, peace, morals, safety and sense of decency of the people.

The Texas Alcoholic Beverage Code states that TABC may cancel an original or renewal permit or license if it finds that the permittee or licensee was finally convicted of a felony while the license or permit was in effect.⁹ The terms "permittee" and "licensee" include presidents,

⁶ Pet. Ex. 1(a) at 4-5.

⁷ *Id.* at 2.

⁸ Pet. Ex. 2 at 31-32.

⁹ Tex. Alco. Bev. Code §§ 11.61(b)(3), 61.71(a)(3). Chapter 11 of the Alcoholic Beverage Code contains provisions generally applicable to TABC permits. The ALJ notes that although Respondent holds a Wine & Beer Retailer's Off-Premise Permit, and the March 31, 2010 Settlement Agreement and Waiver of Hearing refers to a violation of Texas Alcoholic Beverage Code § 11.61(b)(7), Staff's motion for summary disposition primarily cites chapter 61 of the code, which contains provisions generally applicable to licenses. Texas Alcoholic Beverage Code § 26.03(b) states that the provisions "applicable to the cancellation and suspension of a retail dealer's off premise

officers and majority stockholders of corporate entities.¹⁰ In this case, it is undisputed that Mr. Ahmad is the president and sole stockholder of the Respondent corporation and that his felony conviction became final while it held its permit. Accordingly, the ALJ finds that Staff is entitled to a judgment in its favor on this issue.

With regard to Staff's second argument based on Texas Alcoholic Beverage Code § 61.71(a)(17), the record does not contain enough evidence concerning the circumstances of the controlled substance offense for the ALJ to find that Mr. Ahmad's conviction, standing alone, taints the perception of Respondent's business conduct to such an extent that cancellation is warranted based on the people's general welfare, health, peace, morals, safety and sense of decency. TABC rules state that Texas Alcoholic Beverage Code § 61.71(a)(17) is violated when a narcotics-related offense is committed by the licensee in the course of conducting the alcoholic beverage business, or if the offense is committed by anyone on the licensed premises when the licensee knew or, in the exercise of reasonable care, should have known of the offense or the likelihood of its occurrence and failed to take reasonable steps to prevent the offense.¹¹ While the rules also state that Texas Alcoholic Beverage Code § 61.71(a)(17) can be violated by other means, here there is no evidence showing that the narcotics offense was committed on the licensed premises; the ALJ notes that Mr. Ahmad was convicted in Hill County, while Respondent's business was located in McLennan County. The conviction – by itself – does not establish a substantial likelihood that criminal activity occurred or would occur in connection to Respondent's business.

However, Staff's summary disposition evidence also includes records regarding Respondent's compliance history. That evidence shows that Respondent previously admitted to a violation of Texas Alcoholic Beverage Code § 11.61(b)(7), which essentially mirrors the language of Texas Alcoholic Beverage Code § 61.71(a)(17). Less than three months after that

license also apply to the cancellation and suspension of a wine and beer retailer's off premise *permit*” (emphasis added) the ALJ will cite the relevant statutes from chapter 61.

¹⁰ Tex. Alco. Bev. Code §§ 11.61(a), 61.71(c).

¹¹ 16 Tex. Admin. Code § 35.31.

admission, Respondent also accepted responsibility for a gambling-related administrative violation on the licensed premises. Both violations occurred while Mr. Ahmad was Respondent's president. Mr. Ahmad's guilty plea and final conviction definitely establish that he was engaged in narcotics-related criminal activity; as Respondent's president and sole stockholder, Mr. Ahmad knew or should have known that a felony conviction – even for an offense otherwise unrelated to Respondent's business – could result in adverse action against Respondent's permit. Finally, the fact that Respondent, by and through Mr. Ahmad, admitted to serious administrative violations related to the place and manner of its business conduct furthers a reasonable inference that Mr. Ahmad's criminal activities likely were or would be connected to the alcoholic beverage business. For these reasons, the ALJ finds that Respondent's compliance history, considered together with its president's felony conviction for possession and intent to distribute a controlled substance, support the conclusion that cancellation is warranted out of concern for the public's safety and general welfare.

V. PROPOSED FINDINGS OF FACT

1. Respondent H & A Group Inc. d/b/a Jumpin John's holds a Wine & Beer Retailer's Off-Premise Permit, No. BQ704666, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 3130 N 18th Street in Waco, McClellan County, Texas.
2. Respondent's original permit was issued under Chapter 26, Texas Alcoholic Beverage Code, as a new permit on September 26, 2008.
3. From September 26, 2008 until the present, Hassan Rajab Ahmad has been Respondent's president, secretary, director, and sole stockholder.
4. On September 18, 2009, Respondent committed an administrative violation that also constituted a violation of Texas Alcoholic Beverage Code § 11.61(b)(7).
5. On June 10, 2010, Respondent committed a gambling-related administrative violation.
6. On September 26, 2011, Respondent's permit was renewed with an expiration date of September 25, 2013.

7. On January 14, 2013, Mr. Ahmad pled guilty to possession of a controlled substance with intent to distribute, a second-degree felony in violation of Texas Health and Safety Code § 481.1161.
8. On July 19, 2013, Staff issued a notice of hearing, directed to Respondent at its address of record.
9. 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 short, plain statement of the matters asserted.
10. On August 30, 2013, Staff timely filed its First Amended Motion for Summary Disposition. The motion stated the material facts upon which the motion was based, and included supporting summary disposition evidence.
11. The first page of Staff's motion for summary disposition contained the following statement in at least 12-point, bold-face type: "Notice to parties: This motion requests the judge to decide some or all of the issues in this case without holding an evidentiary hearing on the merits. You have 14 days after you received this motion to file a response. If you do not file a response, this case may be decided against you without an evidentiary hearing on the merits. See SOAH's rules at 1 Texas Administrative Code § 155.505. These rules are available on SOAH's public website."
12. Respondent did not file a timely response to Staff's motion for summary disposition.

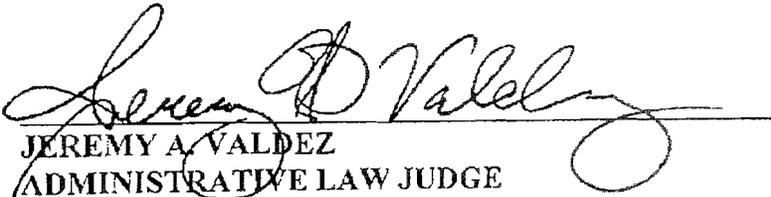
VI. PROPOSED CONCLUSIONS OF LAW

1. TABC has jurisdiction in this case pursuant to Texas Government Code ch. 5 and Texas Alcoholic Beverage Code § 61.71.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Texas Alcoholic Beverage Code § 5.43 and Texas Government Code chs. 2001 and 2003.
3. Respondent was provided timely, proper notice of the hearing. Texas Gov't Code §§ 2001.051-.052.
4. Summary disposition of this contested case is proper because 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. 1 Tex. Admin. Code § 155.505(a).
5. Respondent's permit should be canceled because its president and sole stockholder was

finally convicted of a felony while Respondent held a renewal permit. Tex. Alco. Bev. Code §§ 26.03(b), 71.61(a)(3).

6. Respondent's permit should also be canceled because its compliance history and the felony conviction of its president and sole stockholder show that Respondent has conducted its business in a place or manner which warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, safety, and sense of decency of the people. Tex. Alco. Bev. Code §§ 26.03(b), 71.61(a)(17).

SIGNED October 3, 2014.


JEREMY A. VALDEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS