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ALCOHOLIC BEVERAGE COMMISSION, Petitioner, v. JAKE'S, Respondent

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BEFORE THE STATE OF TENNESSEE
ALCOHOLIC BEVERAGE COMMISSION

ALCOHOLIC BEVERAGE COMMISSION **Petitioner** **v.** **JAKE'S** **Respondent**	**DOCKET NO: 33.01-092026J**

INITIAL ORDER

This matter was heard as a contested case in Nashville, Tennessee on August 2, 2006, before Leonard Pogue, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the Tennessee Alcoholic Beverage Commission. The State was represented by Shari Danielle Elks, Executive Director for the Alcoholic Beverage Commission (agency).

The subject of the hearing was to consider whether the Respondent's liquor license should be suspended/revoked for 1) failure to cooperate with the agency by not providing records requested by the agency, and/or 2) failing to meet the definition of a restaurant.

The Respondent, having received proper notice, was not present for the hearing, nor was an attorney present on behalf of Respondent. The State, through its attorney, moved for a default and revocation of the Respondent's license. The motion was granted based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On May 17, 2006, a Notice of Hearing was personally served on the Respondent. The Notice of Hearing advised Respondent that a hearing was set for June 21, 2006, to consider whether Respondent's license should be suspended or revoked. The Notice of Hearing further informed Respondent that Respondent could be present and represented by counsel at the hearing.

2. At the June 21, 2006, hearing, Mona Sanderson appeared on behalf of Respondent. Ms. Sanderson stated that she was President of the corporation, Jakes Inc., which held the license that was the subject of the hearing. Ms. Sanderson requested that the hearing be rescheduled in order that counsel could be retained. The hearing was continued to July 12, 2006.

3. At the July 12, 2006, hearing, Ms. Sanderson was not present and no attorney appeared on behalf of the Respondent. However, an individual identifying herself as Ms. Sanderson's sister telephoned the agency and reported that Ms. Sanderson had been hospitalized, due to high blood pressure, the preceding evening. The State moved for a default which was denied and the hearing was continued to August 2, 2006.

4. At the time designated for the August 2, 2006, hearing, the Respondent was not present and no attorney appeared on behalf of Respondent. The State moved for a default which was granted and presented proof to support its contention that Respondent's license should be revoked.

5. Amy Farmer, special agent for the agency, testified that she sent a letter to Respondent on October 25, 2005, (received by certified mail on November 21, 2005) notifying the Respondent that an audit would be performed to determine "the actual level

of food service maintained at your establishment." The letter further stated that Respondent needed to supply the agency with food vendor receipts, liquor vendor receipts, beer vendor receipts, cash register tapes, daily records, expenses, and door charge tallies for the period of August 1, 2005 through October 31, 2005. These records were to be delivered to the agency by November 15, 2005. Agent Farmer stated that the agency routinely performs such audits and the Respondent was selected randomly for its audit. Agent Farmer further testified that the audits are necessary to insure licensees meet the agency's food service requirements.

6. The Respondent failed to provide the agency with the records by November 15, 2005. Agent Farmer sent another letter to Respondent on December 28, 2005, (received by certified mail on December 29, 2005) requesting the same documents listed in the October 25, 2005 letter but for the time period of September 1, 2005 through November 30, 2005. The records were to be delivered to the agency by January 19, 2006. Respondent did not respond to the request. Both the October 25 and December 28 letters informed Respondent that agency rules required the Respondent to comply with the records request.

7. Mike Cawthon, special agent in charge of the Nashville District, testified that he was aware of problems with obtaining the Respondent's records and went to the establishment on April 21, 2006. Agent Cawthon spoke with Ms. Sanderson and she agreed to provide the records by April 28, 2006. The records were not delivered to the agency by that deadline. As of the August 2, 2006, hearing, the Respondent had not produced the records.

8. Respondent has held a license since 1995. Since that time, Respondent has received several citations from the agency for employee permit violations and seating violations.

CONCLUSIONS OF LAW

1. Tennessee Code Annotated § 4-5-309 of the "Uniform Administrative Procedures Act" states:

> (a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge or hearing officer, hearing the case alone, or agency, sitting with the administrative judge or hearing officer, may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

2. Rule 1360-4-1-.15 of the "Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies" provides:

> (1) Default.
>
> (a) The failure of a party to attend or participate in a prehearing conference, hearing or other stage of contested case proceedings after due notice thereof is cause for holding such party in default pursuant to T.C.A. § 4-5-309. Failure to comply with any lawful order of the administrative judge or agency, necessary to maintain the orderly conduct of the hearing, may be deemed a failure to participate in a stage of a contested case and thereby be cause for a holding of default.
>
> (b) After entering into the record evidence of service of notice to an absent party, a motion may be made to hold the absent party in default and to adjourn the proceedings or continue on an uncontested basis.
>
> (c) The administrative judge, when sitting with an agency, advises the agency whether the service of notice is

sufficient as a matter of law, according to rule 1360-4-1-.06.

(d) If the notice is held to be adequate, the agency, or administrative judge hearing a case alone, shall grant or deny the motion for default, taking into consideration the criteria listed in rule 1360-4-1-.06, subsections (2) (a) through (2)(d), where appropriate. Grounds for the granting of a default shall be stated and shall thereafter be set forth in a written order. If a default is granted, the proceedings may then be adjourned or conducted without the participation of the absent party.

(e) The agency or administrative judge shall serve upon all parties written notice of entry of default for failure to appear. The defaulting party, no later than ten (10) days after service of such notice of default, may file a motion for reconsideration under T.C.A. § 4-5-317, requesting that the default be set aside for good cause shown, and stating the grounds relied upon. The agency or administrative judge may make any order in regard to such motion as is deemed appropriate, pursuant to T.C.A. § 4-5-317.

(2) Effect of Entry Default.

(a) Upon entry into the record of the default of the petitioner at a contested case hearing, the charges shall be dismissed as to all issues on which the petitioner bears the burden of proof, unless the proceedings are adjourned.

(b) Upon entry into the record of the default of the respondent at a contested case hearing, the matter shall be tried as uncontested as to such respondent, unless the proceedings are adjourned.

(3) Uncontested Proceeding. When the matter is tried as uncontested, the petitioner has the burden of establishing its allegations by a preponderance of the evidence presented.

3. Tennessee Code Annotated § 57-4-102 (27) (A) provides as follows:

"Restaurant" means any public place kept, used, maintained, advertised and held out to the public as a place where meals are served and where meals are actually and regularly served, without sleeping accommodations, such place being provided with adequate and sanitary kitchen and dining room equipment and

> seating capacity of at least (75) people at tables, having employed therein a sufficient number and kind of employees to prepare, cook and serve suitable food for its guests. At least one (1) meal per day shall be served at least five (5) days a week, with the exception of holidays, vacations, and period of redecorating, and the serving of such meals shall be the principal business conducted. A restaurant shall also be eligible for licensure under this subdivision if the restaurant serves at least one (1) meal a day at least four (4) days a week with the exception of holidays, vacations and periods of redecorating, and if the serving of such meals is the principal business conducted, and if such restaurant is only open for four (4) days a week.

4. Alcoholic Beverage Commission Rule 0100-1-.03(5) states:

> Refusal of Cooperation – Any licensee, his agent, or employee who refuses to open or disclose his records to, or furnish information to, an Agent of the Tennessee Alcoholic Commission upon any matter relating to or arising out of the conduct of the licensed premises shall subject the license to suspension or revocation.

5. Respondent not only received notice of the hearing, but the hearing was continued on two separate occasions to accommodate Respondent. Because Respondent did not participate in the hearing after due notice, Respondent is held in default.

6. During the course of a routine and random audit, the agency requested the Respondent to provide certain records. The agency needed the records to determine if the Respondent met the definition of restaurant. Respondent was notified by letter twice and in-person once that the requested records should be delivered to the agency. After three deadlines over the course of approximately nine months, Respondent refused, without explanation, to provide the information. As set forth in Rule 0100-1-.03(5), a licensee that refuses to furnish information subjects the license to revocation or suspension. The agency cannot perform its duty of regulating the sale of intoxicating liquors when a

licensee refuses to cooperate. Respondent's blatant disregard for the agency's authority and rules warrants the revocation of Respondent's license.

It is therefore **ORDERED** that Respondent is held in **DEFAULT** and Respondent's license be **REVOKED**.

Entered this 7th day of August 2006.

Leonard F. Pogue
Administrative Judge

Filed in the Administrative Procedures Division, this 7th day of August, 2006.

Charles C. Sullivan, II, Director
Administrative Procedures Division