

SOAH DOCKET NO. 458-03-1959

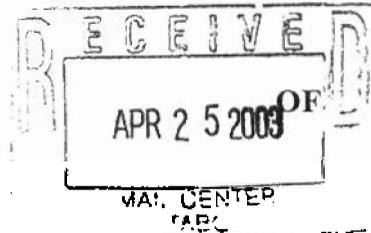
TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

LGS, INC.
D/B/A RASCALS
HARRIS COUNTY, TEXAS

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BEFORE THE STATE OFFICE



ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against LGS, INC. d/b/a RASCALS (Respondent) seeking forfeiture of the full amount of the Respondent's conduct surety bond. TABC alleged the Respondent committed three violations of the Texas Alcoholic Beverage Code since September 1, 1995. TABC also alleged the violations have been finally adjudicated. The Respondent appeared and contended that TABC had misrepresented itself to Respondent in that TABC would not seek forfeiture of the conduct surety bond. Respondent further asserted they had a meritorious defense to one of the alleged past violations. This Proposal for Decision finds the Respondent's conduct surety bond should be forfeited.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing in this matter convened on February 14, 2003. Staff Attorney Lindy To represented TABC. The Respondent appeared and was represented by attorney Albert Van Huff. Timothy J. Horan, Administrative Law Judge (ALJ), presided and the record was closed on February 24, 2003.

The notice of hearing, dated January 31, 2003, was sent, by certified mail, return receipt requested, to the Respondent at 12102 Cypress Place Drive, Houston, Texas 77065-1911. No party challenged notice, jurisdiction, or venue. The Commission and the State Office of Administrative Hearings have jurisdiction over this matter as reflected in the conclusions of law. The notice of intention to institute enforcement action and of the hearing met the notice requirements imposed by statute and by rule as set forth in the findings of fact and conclusions of law.

II. EVIDENCE AND ANALYSIS

A. Evidence.

The staff of TABC (Staff) offered documentary evidence from the TABC files. Those documents show:



(a) On June 29, 2001, Respondent posted a conduct surety bond in the amount of \$5,000 asserting it would faithfully conform with the Texas Alcoholic Beverage Code (the Code) and the rules of TABC.

(b) LGS, INC. d/b/a RASCALS was issued a Mixed Beverage Permit MB-498432, Mixed Beverage Late Hours Permit LB-498433, and Beverage Cartage Permit PE-498434, by TABC on August 29, 2001.

(c) On September 14, 2002, Respondent was issued citations for alleged violations of the Code.

(d) On October 14, 2002, the Respondent signed a document entitled "Agreement and Waiver of Hearing" which, in each instance, included the following language, "I neither admit nor deny that the violations stated above have occurred and do hereby waive my right to a hearing . . . The signing of this waiver may result in the forfeiture of any related conduct surety bond."

(e) The October 14, 2002 waiver document listed the alleged violations as consumption during prohibited hours, possession of uninvoiced alcoholic beverage, and possession of gambling paraphernalia.

(f) On October 21, 2002, based on the "Agreement and Waiver of Hearing" documents signed by the Respondent, TABC issued orders assessing the Respondent penalties for the violations listed. The October 21, 2002 order assessed a fifteen day suspension of license numbers MB-498432, LB-498433, and PE-498434 unless the Respondent paid a \$2,250.00 penalty before November 13, 2002.

LGS, INC. president Steve Stewart testified that TABC misrepresented itself to the Respondent. He was under the impression that by signing the "Agreement and Waiver of Hearing" that the September 14, 2002 violations would not result in the forfeiture of his conduct surety bond. Respondent further states that they could have asserted a meritorious defense to the September 14, 2002 violation of possession of uninvoiced alcoholic beverage.

B. Analysis.

The Staff had the burden of proof in this hearing. The issues to be decided are whether the Respondent was the subject of "final adjudication" of three violations of the Code after September 1, 1995, and if so, did TABC waive its right to pursue action against the Respondent's conduct surety bond. On October 14, 2002, Respondent signed the "Agreement and Waiver of Hearing" which states in part that by signing of the waiver it may result in the forfeiture of any conduct surety bond.

The rules of TABC, at 16 TEX. ADMIN. CODE CODE (TAC) §33.24(j) provide:

(1) When a license or permit is canceled, or a final adjudication that the licensee or permittee has committed three violations of the Alcoholic Beverage Code since

September 1, 1995, the commission shall notify the licensee or permittee, in writing, of its intent to seek forfeiture of the bond.

(2) The licensee or permittee may . . . request hearing on the question of whether the criteria for forfeiture of the bond, as established by the Alcoholic Beverage Code, §11.11 and §61.13 and this rule have been satisfied.

The applicable statutory provisions at TEX. ALCO. BEV. CODE ANN. §§11.11(b)(2) state:

(b) . . . the holder of the permit agrees that the amount of the bond shall be paid to the state if the permit is revoked or on final adjudication that the holder violated a provision of this code. . . .

The Staff takes the position that the Order issued on October 21, 2002, amounts to a final adjudication. The order contains a warning to the Respondent that the order will become final and enforceable either at the time it is signed or 21 days after the date it is signed unless the Respondent files a motion for rehearing. There is no evidence the Respondent filed such a motion. The undersigned ALJ agrees with the Staff's position that the order issued on October 21, 2002, that each alleged violation became a final adjudication that the Respondent had violated the Code when the Respondent failed to seek a rehearing. The October 14, 2002 "Agreement and Waiver of Hearing" signed by Respondent is clear and states that signing the waiver may result in the forfeiture of any conduct surety bond. The instant hearing is not the proper forum to challenge the findings contained in the order nor is it the proper forum to assert a meritorious defense on an already adjudicated violation.

III. RECOMMENDATION

Based on a preponderance of the evidence, the Respondent committed three violations of the Code since September 1, 1995, in violation of Texas Alcoholic Beverage Commission rules, 16 TAC §33.24. As a consequence, the full amount of the conduct surety bond, or any instrument serving in place of a conduct surety bond (including, but not limited to certificates of deposit and letters of credit), should be forfeited.

IV. PROPOSED FINDINGS OF FACT

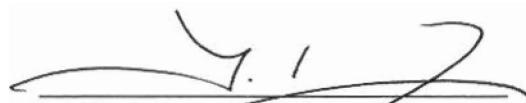
1. LGS, INC. d/b/a RASCALS (Respondent) is the holder of Mixed Beverage Permit MB-498432, Mixed Beverage Late Hours Permit LB-498433, and Beverage Cartage Permit PE-498434, issued by the Texas Alcoholic Beverage Commission (TABC) on August 29, 2001 and which have been continuously renewed.
2. On June 29, 2001, the Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.

3. On January 31, 2003, the staff of TABC (the Staff) sent a Notice of Hearing by certified mail, return receipt requested, to the Respondent asserting that TABC was seeking to forfeit the Respondent's surety bond.
4. The hearing on the merits was conducted on February 14, 2003. Staff Attorney Lindy To represented the Staff. The Respondent appeared and was represented by attorney Albert Van Huff. Timothy J. Horan, Administrative Law Judge (ALJ) presided.
5. On October 14, 2000, the Respondent signed an "Agreement and Waiver of Hearing" regarding three alleged violations of the Texas Alcoholic Beverage Code (the Code), for which TABC entered an Order finding the Respondent committed the violations and imposed a fifteen days suspension or a civil penalty of \$2,250.00 on the Respondent.
6. The Respondent has committed three violations of the Code since September 1, 1995.

V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (TABC) has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§6.01 and 11.11.
2. The State Office of Administrative Hearings has jurisdiction to conduct the administrative hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch. 2003.
3. Notice of the hearing was provided as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052.
4. The Respondent violated the rules of TABC found at 16 TEX. ADMIN. CODE §33.24 by committing three violations of the Texas Alcoholic Beverage Code (the Code) since September 1, 1995.
5. TABC is permitted by TEX. ALCO. BEV. CODE ANN. §11.11 and 16 TEX. ADMIN. CODE §33.24 to forfeit the conduct surety bonds of permittees who commit three or more violations of the Code since September 1, 1995.
6. Based on the foregoing Findings of Fact and Conclusions of Law, the conduct surety bond executed by the Respondent should be forfeited to the State.

SIGNED this 21st day of April, 2003.



TIMOTHY J. HORAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 602968

IN RE LGS INC.	§	BEFORE THE
D/B/A RASCALS	§	
PERMIT NOS. MB498432, LB498433,	§	
PE498434	§	TEXAS ALCOHOLIC
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-1959)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 19th day of May 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Timothy J. Horan. The hearing convened on February 14, 2003, and adjourned on February 14, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on April 21, 2003. 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.

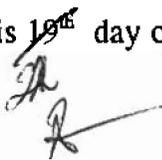
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and 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 Respondent's conduct surety bond in the amount of **\$5,000.00** be **FORFEITED**.

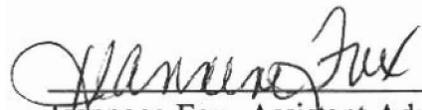
This Order will become final and enforceable on June 9, 2003, unless a Motion for Rehearing is filed before that date.

By copy of this Order, service shall be made upon all parties by facsimile or through the U.S. Mail, as indicated below.

SIGNED this 19th day of May, 2003.



On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

/bc

The Honorable Timothy J. Horan
Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (713) 812-1001

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Lindy To
ATTORNEY FOR PETITIONER
TABC Legal Section

Regulatory Division

Houston District Office