

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

June 14, 1999

Doyme Bailey
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive, Suite 160
Austin, Texas 78731

VIA CERTIFIED MAIL Z269 601 774

RE: Docket No. 458-98-0381; Texas Alcoholic Beverage Commission vs. Herman Wyatt
d/b/a Little Al's (TABC Case No. 575011)

Dear Mr. Bailey:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Andrew del Cueto, attorney for Texas Alcoholic Beverage Commission, and to Respondent Herman Wyatt d/b/a Little Al's. For reasons discussed in the proposal, I recommend Respondent's conduct surety bond be forfeited to the State.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark S. Richards".

Mark S. Richards
Administrative Law Judge

MSR:fgm

Enclosure

xc: Rommel Corro, Docket Clerk, State Office of Administrative Hearing
✓ Andrew del Cueto, Staff Attorney, Texas Alcoholic Beverage Commission
Herman Wyatt, d/b/a Little Al's, 6308 Bexar, Dallas, Texas 75215

Regular Mail

Certified Mail Z269-601-775

Certified Mail Z269-601-776

JUN 16

DOCKET NO. 458-98-0381

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

VS.

HERMAN WYATT
D/B/A LITTLE AL'S
PERM NO. Q-243558
DALLAS COUNTY, TEXAS
(TABC CASE NO. 575011)

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Commission) initiated this action seeking forfeiture of the conduct surety bond posted by Herman Wyatt (Respondent) d/b/a Little Al's. Respondent posted a conduct surety bond on the 31st day of January, 1996, in compliance with Section 11.11 of the Texas Alcoholic Beverage Code (the Code). The Commission's Staff (the Staff) recommended that the bond be forfeited because Respondent's permit had been canceled for cause by order dated March 24, 1997. This proposal for decision agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the findings of fact and conclusions of law without further discussion here.

On May 5, 1998, Mark S. Richards, Administrative Law Judge for the State Office of Administrative Hearings (SOAH), convened a public hearing at the Hearing Facility of the State Office of Administrative Hearings, Dallas, Texas. Herman Wyatt appeared in person and represented Respondent. Clyde Burleson, Assistant Attorney General, appeared by telephone to represent the Staff. Evidence and argument were heard. At the conclusion of the hearing the record was closed.

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II. CONDUCT SURETY BOND

On February 4, 1994, the Commission issued a Wine Only Package Store Permit, Q-243558, to Respondent for the premises known as Little Al's at 6308 Bexar Street, Dallas, Dallas County, Texas.

On January 31, 1996, Respondent, executed a conduct surety bond for Little Al's in the amount of \$10,000 as required by Section 11.11 of the Code.

III. EVENTS LEADING TO THE REQUEST TO FORFEIT RESPONDENT'S CONDUCT SURETY BOND

On March 19, 1997, Respondent signed an "Agreement and Waiver of Hearing" in Docket Number 572747 regarding violation of the Code. The Waiver Agreement stated that Respondent's violation consisted of "Place and Manner of Operation". Section 11.61(b)(7) of the Code provides:

- (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:
- (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.

Mr. Wyatt testified that he had been assessed deferred adjudication for food stamp fraud. He also testified that he had read the Waiver Agreement prior to signing it and that he had been told by a TABC representative that the provisions of the Code relative to cancellation applied with equal force to deferred adjudication or to a final conviction. The pertinent portion of the Waiver Agreement over Mr. Wyatt's signature is as follows:

My name is Herman Wyatt. I am owner. I hereby declare that the violations stated above have occurred and do hereby waiver (sic) my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/canceled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of -0- must be received by the final due date stated on the administrative order. I am aware that this agreement may be rejected by the Administrator of the Texas Alcoholic Beverage Commission at which time the licensee or permittee will be granted a hearing on the matters in question.

As a result of the Waiver Agreement, the Commission Administrator entered an Order on March 24, 1997, stating that the violation did occur. Further, the Order adopted the above described

waiver of hearing and assessed the penalty as cancellation of Respondent's Permit. Although Respondent testified that he spoke to his attorney concerning the matter, no Motion for Rehearing was ever filed and the Order was allowed to become final.

IV. FORFEITURE OF CONDUCT SURETY BOND

The Commission may revoke or suspend a permit, if the holder violates a provision of the Code or a rule of the Commission. TEX.ALCO.BEV.CODE Section 6.01. "Permittee" means a person who is the holder of a permit provided for in the Code, or an agent, servant, or employee of that person. TEX. ALCO. BEV. CODE Section 1.04(11). 16 TEX. ADMIN. CODE §33.24(j) governs forfeiture of a conduct surety bond, and provides that the Commission may seek forfeiture when a license or permit has been canceled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the Code since September 1, 1995.

When posting a conduct surety bond, the permit or license holder must agree not to violate a Texas law relating to alcoholic beverages, or a Commission rule. The holder must also agree 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 the Code. The Commission's rule at 16 TEX. ADMIN. CODE. §33.24 also applies and requires forfeiture upon cancellation, or upon final adjudication determining a holder has committed three violations of the Code since September 1, 1995.

The purpose of this hearing is not to re-litigate the prior violations, which have been adjudicated by an Order that has long since become final, but to ascertain that the requirements preliminary to the bond forfeiture have been met. The subject is the forfeiture, not the underlying prior violation, and a collateral attack on the Order of March 24, 1997 will not be entertained.

PROPOSED FINDINGS OF FACT

1. On February 4, 1994, the Commission issued a Wine Only Package Store Permit, Q-243558, to Respondent for the premises known as Little Al's at 6308 Bexar, Dallas, Dallas County, Texas. The Permit was continually renewed until canceled for cause on April 14, 1997.
2. The hearing was convened on May 5, 1998, at the offices of the State Office of Administrative Hearings in Dallas, Texas. The Commission was represented by telephone by its counsel, Clyde Burleson. Hernan Wyatt appeared personally to represent Respondent.
3. Both parties stipulated that Respondent received proper and timely notice of the hearing.
4. On January 31, 1996, Respondent executed a conduct surety bond for Little Al's for \$10,000 as required by Section 11.11 of the Code. The bond has remained effective at all times since executed.

5. On March 19, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding violation of the Code in the place and manner of Respondent's operation. In this regard, Respondent was placed on deferred adjudication for the felony offense of food stamp fraud, thus admitting the Code violation.
6. By signing the waiver agreement, Respondent waived his right to a hearing to contest the violation of Section 11.61(b) (7) of the Code.
7. On March 24, 1997, the Commission Administrator entered an order finding Respondent committed the violation of the Code consistent with Respondent's admissions found in Finding of Fact Number 5 and canceling Respondent's permit.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to Subchapter B of Chapter 5 of the TEX. ALCO. BEV. CODE (Vernon 1995).
2. The State Office of Administrative Hearings has jurisdiction over the matters related to the hearings in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN., Sections 2003.021(b) and 2003.042(6) (Vernon 1998).
3. As referenced in Finding of Fact Number 2, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN Sections 2001.051 and 2001.052 (Vernon 1998).
4. Based upon Findings of Fact Nos. 1 and 4, Respondent held Wine Only Package Store Permit No. Q-243558, and posted a conduct surety bond in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE Section 11.11 (Vernon 1995 and Vernon Supp. 1998).
5. A Conduct Surety Bond may be forfeited upon cancellation of a license or permit. 16 TEX. ADMIN. CODE §33.24.
6. Based upon Findings of Fact Nos. 1 and 5, Respondent violated 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE Section 11.11 by violating a Commission rule and law of the State of Texas while holding a Wine Only Package Store Permit No. Q-243558, issued by the Commission, which resulted in cancellation of the permit.

7. Based on Findings of Fact Nos. 5 and 8, and Conclusions of Law Nos. 5 and 6, the conduct surety bond executed by Respondent should be forfeited to the State.

SIGNED and entered this 14 day of June, 1999.



Mark S. Richards, Administrative Law Judge
State Office Of Administrative Hearings