

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 26, 1999

Mr. Doyne Bailey, Administrator
Texas Alcoholic Beverage Commission
5806 Mesa, Suite 160
Austin, Texas 78711

HAND DELIVERY

RE: Docket No. 458-99-0113; C. E. Entertainment, Ltd.; TABC No. 581566

Dear Mr. Bailey:

Please find enclosed a Proposal for Decision that has been prepared for your consideration in the above referenced case. Copies of the Proposal for Decision are being sent to Gayle Gordon, counsel representing the Texas Alcoholic Beverage Commission, and to Mark A. Sanchez, Respondent's attorney. For reasons discussed in the Proposal for Decision, I have recommended that Respondent's conduct surety bond be forfeited.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon Supp. 1996), each party has the right to file exceptions to the Proposal for Decision and to present a brief with respect to the exceptions. If any party files exceptions or briefs, all other parties may file a reply. Exceptions and replies must be filed according to the time limits specified in TABC rules. A copy of any exceptions, briefs on exceptions, or reply must also be filed with the State Office of Administrative Hearings and served on the other party in this case.

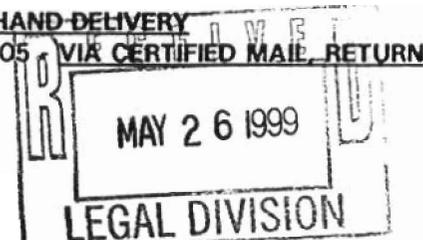
Sincerely,

A handwritten signature in black ink that reads "Michael J. Borkland".

Michael J. Borkland
Administrative Law Judge

MJB/es
Enclosures

cc: Gayle Gordon, TABC, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY
Mark A. Sanchez, 115 E. Travis, Ste. 618, San Antonio, TX 78205 VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED NO. 2 332 923 666
Docketing, State Office of Administrative Hearings



William P. Clements Building
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DOCKET NO. 458-99-0113
(TABC CASE NO. 581566)

TEXAS ALCOHOLIC BEVERAGE § BEFORE THE STATE OFFICE
COMMISSION §
§
vs. §
§ OF
C. E. ENTERTAINMENT, LTD. §
D/B/A TEJANO TX/COYOTE'S §
PERMIT NO. MB-249656, §
LB-249657 & PE-249658 §
HARRIS COUNTY, TEXAS § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

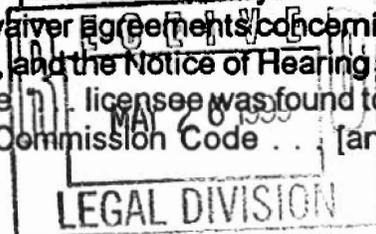
The Staff of the Texas Alcoholic Beverage Commission (Staff or Commission) initiated this action seeking forfeiture of the conduct surety bond posted by C. E. Entertainment, Inc. d/b/a Tx/Coyote's (Respondent). The Staff recommended that the bond be forfeited because Respondent had committed three violations of the Code since September 1, 1995. Petitioner appeared by and through its staff attorney, Gayle Gordon. Respondent appeared by and through its attorney, Mark Anthony Sanchez. The Administrative Law Judge (ALJ) agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

I. Jurisdiction, Notice, Evidentiary Matters and Procedural History

The hearing in this matter convened on February 24, 1999, before Administrative Law Judge Joe Gilbreath, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. The case was subsequently assigned to Administrative Law Judge Michael J. Borkland for preparation of this proposal for decision.

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. Respondent's attorney stipulated that the Notice of Hearing had been properly served on Respondent by certified mail.

Respondent filed a Plea to the Jurisdiction and Motion in Limine. Argument was heard by ALJ Gilbreath. Respondent argued that the notice of intention to seek forfeiture of the conduct surety bond dated September 30, 1998, failed to provide proper and adequate notice of the violations allegedly committed by respondent by use of the term "miscellaneous violations". Petitioner argued that Respondent was fully aware of the violations because Respondent had previously signed waiver agreements concerning the violations referred to in the letter of September 30, 1998, and the Notice of Hearing stated that the conduct surety bond should be forfeited because . . . licensee was found to have committed three violations of the Alcoholic Beverage Commission Code . . . [and the]



violations have been finally adjudicated." ALJ Gilbreath found that notice was adequate and overruled Respondent's Plea to the Jurisdiction..

In the Motion in Limine Respondent objected to use of the adjudicated prior violations for forfeiture of the bond because the violations had been resolved by compromise and settlement entered into between the parties. Respondent argued that the settlement agreements were entered into to buy peace, not to admit to violations, and should therefore not be considered. ALJ Gilbreath denied Respondent's motion.

Respondent also offered evidence at the hearing over Petitioner's objection to collaterally attack the settlement agreements. ALJ Gilbreath withheld a ruling on Petitioner's objection pending the issuance of this PFD. The undersigned ALJ having reviewed the record and argument of counsel sustains Petitioner's objection. While Respondent may not have admitted to the prior violations, Respondent waived its right to a hearing on the violations, agreed to pay penalties, and orders were entered by the Commission Administrator finding that violations had occurred. Those matters were fully and finally adjudicated. The time for Respondent to argue the merits relative to those alleged violations has long since come and gone. The subject of the instant hearing is not the underlying prior violations but rather forfeiture of the conduct surety bond resulting from the number of prior adjudicated violations.

Respondent also argued that this proceeding amounts to an impermissible reopening of the settlement agreements because the parties had specifically agreed to a monetary punishment and that to now attempt to increase that monetary punishment by seeking to collect on the conduct surety bond reopens the previously agreed to settlements. At first blush this is an attractive argument, but on deeper evaluation it is found to have little merit. Respondent's reasoning would prevent the criminal courts from using the "three strikes and you're out" laws to further punish habitual criminals with prior adjudicated violations of the law. In those instances it matters not that those prior violations were adjudicated by settlement (plea bargain and guilty plea) or jury trial, the prior adjudicated offenses can be used for purposes of enhancement. There is no different standard here.

Respondent also objected to the use of extraneous violations for purposes of forfeiting the conduct surety bond. ALJ Gilbreath ruled that he would not consider any violations not in the notice of hearing, plus, only those violations that are the subject of final orders and fully adjudicated as set forth in Petitioner's Exhibit No. 2 are to be considered.

II. Conduct Surety Bond

On October 24, 1998, the Commission renewed a *Mixed Beverage Permit No. MB-249656*, for Respondent for the premises known as Tejano Tx/Coyote's at 8759 Grissom, Road, San Antonio, Bexar County, Texas. On January 29, 1996, Respondent, as holder of a mixed beverage permit, obtained a \$5,000.00 Certificate of Deposit at Kelly Field National Bank to be held for assignment to the Texas Alcoholic Beverage Commission on behalf of Tejano Tx/Coyote's, as required by Sections 11.11 and 61.13 of the Code. Said

Certificate of Deposit was assigned to the Commission by conduct surety assignment dated August 12, 1996. The assignment remains effective until released by the Commission.

III. Events Leading to the Request to Forfeit Respondent's Conduct Surety Bond

On August 20, 1998, Respondent signed an "Agreement and Waiver of Hearing" in Docket Number 579679, regarding three violations of the Code. The waiver agreement stated that on May 14, 1998, Respondent gave a check for \$672.10 that was returned for insufficient funds in violation of Sec. 61.73(b) of the Code; that on May 14, 1998, Respondent gave a check for \$147.10 that was returned for insufficient funds in violation of Sec. 61.73(b) of the Code; and that on April 30, 1998, Respondent gave a check for \$239.20 that was returned for insufficient funds in violation of Sec. 61.73(b) of the Code.

As a result of this waiver agreement, the Commission Administrator entered an Order on August 25, 1998, finding the violations, as stated, did occur. Further, the Order adopted the above described waiver of hearing and assessed the penalty of suspension of Respondent's permit for a period of ten days beginning on October 16, 1998, unless Respondent paid a civil penalty in the amount of \$1,500.00 on or before October 14, 1998.

On March 17, 1997, Respondent signed an "Agreement and Waiver of Hearing" in Docket Number 569759, regarding three violations of the Code. The waiver agreement stated that on two separate occasions on June 13, 1996, Respondent sold alcoholic beverages to an intoxicated person in violation of Sec. 11.61(b)(14) of the Code; and that on June 13, 1996, Respondent sponsored a cover charge or buy-in related to the reduced price of an alcoholic beverage in violation of Sec. 11.61(b)(2) of the Code.

As a result of the waiver agreement, the Commission Administrator entered an Order on March 19, 1997, finding the violations, as stated, did occur. Further, the Order adopted the above described waiver of hearing and assessed the penalty of suspension of Respondent's permit for a period of seven days beginning April 9, 1997, unless Respondent paid a civil penalty in the amount of \$1050.00 on or before April 2, 1997.

On July, 22, 1997 Respondent signed an "Agreement and Waiver of Hearing" in Docket Number 574660, regarding one violation of the Code. The waiver agreement stated that on June 9, 1997, Respondent committed a cash law violation, governed by Sec. 11.61(b) (2) of the code. The agreement contained the following language:

My name is Charles S. Phillips. I am an officer of the corp. I neither admit or deny that the violations stated above have occurred and do hereby waive my right to a hearing. I understand that the primary CLP stated above as well as all associated licenses or permits will be suspended/cancelled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$750.00 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 questions. The signing of this waiver may result in the forfeiture of any related conduct surety bond.

As a result of this waiver agreement, the Commission Administrator entered an Order on July 25, 1997, finding that Respondent violated the Code as stated in the agreement and waiver of hearing. The Order further provided that Respondent's licenses were suspended for five (5) days unless Respondent paid \$750.00 as a civil penalty on or before August 27, 1997.

IV. Forfeiture of Conduct Surety Bond

The Commission may revoke a license or permit, or deny renewal of a license or permit, if the holder violates a provision of the Code or a rule of the Commission. TEX. ALCO. BEV. CODE ANN., §§ 6.01 and 61.71. Texas Alcoholic Beverage Commission's (TABC) rule found at 16 Tex. Admin. Code (TAC) § 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 cancelled, or where there has been a final adjudication that the licensee or permittee has committed three violations of the Code since September 1, 1995.

PROPOSED FINDINGS OF FACT

1. On October 28, 1998, the Texas Alcoholic Beverage Commission (Commission) renewed a *Mixed Beverage Permit*, MB-249656, a *Mixed Beverage Late Hours Permit*, LB-249657, and a *Beverage Cartage Permit*, PE- 249658, issued to Respondent for the premises known as Tejano Tx/Coyote's at 8759 Grissom Road, San Antonio, Bexar County, Texas. On August 12, 1996, Respondent, as holder of the mixed beverage permit, assigned a \$5,000.00 Certificate of Deposit by Conduct Surety Assignment for Tejano Tx/Coyote's to the Texas Alcoholic Beverage Commission.
2. Respondent received proper and timely notice of the hearing from the Staff for the Commission (the Staff) in a notice of hearing, dated January 25, 1999. The notice was properly sent to Respondent at the address provided in findings of fact No. 1. The notice of hearing was received by Respondent.
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 short, plain statement of the matters asserted.
4. The hearing was convened on February 24, 1999, at the offices of the State Office of Administrative Hearings in San Antonio, Bexar County, Texas. Respondent was represented at the hearing by Mark Anthony Sanchez. Petitioner was represented by Gayle Gordon.
5. On August 20, 1998, Respondent signed an "Agreement and Waiver of Hearing" regarding three violations of the Code. By signing the waiver agreement, Respondent declared that on May 14, 1998, Respondent gave a check for \$672.10 that was returned for insufficient funds; that on May 14, 1998, Respondent gave a

check for \$147.10 that was returned for insufficient funds; and that on April 30, 1998, Respondent gave a check for \$239.20 that was returned for insufficient funds. Respondent acknowledged three violations of the Code had occurred and that his permit would be suspended or cancelled by the Commission unless he paid a civil penalty.

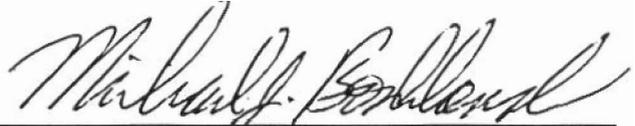
6. On August 25, 1998, the Commission Administrator entered an order finding Respondent had committed three violations of the Code consistent with Respondent's admissions found in Finding of Fact No. 5.
7. On March 17, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding three violations of the Code. By signing the waiver agreement, Respondent declared that on two separate occasions on June 13, 1996, Respondent sold alcoholic beverages to an intoxicated person; and that on June 13, 1996, Respondent sponsored a cover charge or buy-in related to the reduced price of an alcoholic beverage.
8. On March 19, 1997, the Commission Administrator entered an order finding Respondent had committed three violations of the Code consistent with Respondent's admissions found in Finding of Fact No. 7.
9. On July 22, 1997, Respondent signed an "Agreement and Waiver of Hearing" regarding one violation of the Code. By signing the waiver agreement, Respondent declared that on June 9, 1997, Respondent committed a cash law violation.
10. On July 25, 1997, the Commission Administrator entered an order finding Respondent had committed one violation of the Code consistent with Respondent's admissions found in Finding of Fact No. 9.
11. Respondent has committed at least three violations of the Code and had at least three final adjudications regarding these violations since September 1, 1995.

PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission (Commission) has jurisdiction over this matter pursuant to SUBCHAPTER B OF CHAPTER 5, OF TEX. ALCO. BEV. CODE ANN. (Vernon 1995 & Supp. 1999).
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a proposal for decision containing findings of fact and conclusions of law pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 (Vernon Supp. 1999) and TEX. GOV'T CODE ANN. ch. 2003 (Vernon 1999).
3. Proper and timely notice of the hearing was effected on Respondent pursuant to Administrative Procedure Act (APA), TEX. GOV'T CODE ANN. ch. 2001 (Vernon 1999).

4. A conduct surety bond may be forfeited when there is a final adjudication that a permittee or licensee has committed three violations of the Code since November 1, 1995. 16 TEX. Admin. Code §33.24(j).
5. The Code does not distinguish between a holder of a permit or license and the employee of such a holder in setting out the requirements for a conduct surety bond and for forfeiture of that bond in §11.11(b) of the Code.
6. A principal of a conduct surety bond is liable for Code violations that occurred and were adjudicated while the bond was in effect.
7. Based upon Finding of Fact Nos. 5-11 and Conclusion of Law Nos. 4-6, in compliance with §11.11 of the Code, Respondent's surety bond should be forfeited because Respondent has had three violations of the Code.

SIGNED and entered this 26th day of May 1999.



MICHAEL J. BORKLAND
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS