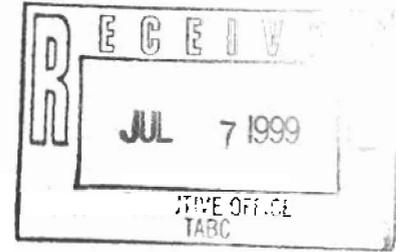


State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

July 6, 1999



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

ORIGINAL VIA CERTIFIED MAIL No. Z419438123

RE: Docket No. 458-99-0314; Texas Alcoholic Beverage Commission vs. Nancy Mae Johnson d/b/a Club Lovell's (TABC Case No. 579424)

Dear Mr. Bailey:

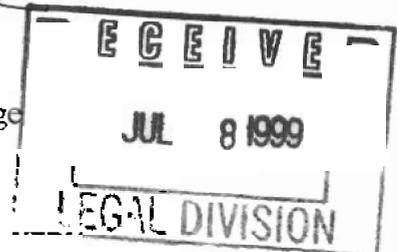
Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Gayle Gordon, attorney for Texas Alcoholic Beverage Commission, and to Respondent, Nancy Mae Johnson d/b/a Club Lovell's. For reasons discussed in the proposal, I recommend that Respondent's Conduct Surety Bond be forfeited.

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 cursive script, appearing to read "Suzan Moon Shinder".

Suzan Moon Shinder
Administrative Law Judge



SMS:me
Enclosure

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing -
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Ste. 160, Austin, Texas
78731 - **CERTIFIED MAIL NO. Z419438124, RETURN RECEIPT REQUESTED**
Nancy Mae Johnson d/b/a Club Lovell's, P.O. Box 1631, Rockdale, Texas 76567, and 101 Mulberry Street,
Rockdale, Texas 76567 - **CERTIFIED MAIL NOS. Z419438125 and Z419438126, RETURN RECEIPTS
REQUESTED**

Village Green Center
4201 Lakeshore Drive, Suite F ♦ Waco, Texas 76710
(817) 776-5844 Fax (817) 776-7406
254 254

TEXAS ALCOHOLIC BEVERAGE
COMMISSION

vs.

NANCY MAE JOHNSON
D/B/A CLUB LOVELL'S
PERMIT NO. BG-406896
(TABC CASE NO. 579424)

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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 Nancy Mae Johnson d/b/a Club Lovell's (Respondent). Respondent posted a conduct surety bond on the 15th day of January, 1997, in compliance with Section 11.11 of the Texas Alcoholic Beverage Code (the Code). The Commission's Staff (Staff) recommended that the bond be forfeited because Respondent had committed at least three violations of the Code subsequent to September 1, 1995. Respondent contended that she would now like to contest whether or not one of the persons intoxicated on her licensed premises on November 30, 1997, was actually an employee. This proposal for decision agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

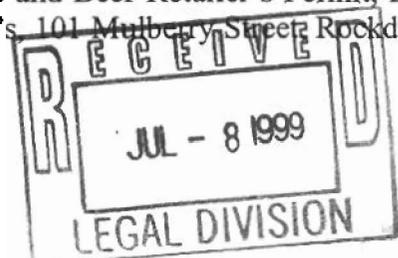
I. Jurisdiction, Notice, and Procedural History

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

On June 8, 1999, Suzan M. Shinder, Administrative Law Judge for the State Office of Administrative Hearings (SOAH), convened a public hearing at the hearings' facility of the State Office of Administrative Hearings, Waco, Texas. Respondent appeared in person and represented herself. The Commission appeared by and through its staff attorney, Gayle Gordon. A record of the proceedings was made by the court, tape-recording same. At the conclusion of the hearing the record was closed.

II. Conduct Surety Bond

On February 10, 1997, the Commission issued a Wine and Beer Retailer's Permit, BG-406896, to Respondent for the premises known as Club Lovell's, 101 Mulberry Street, Rockdale, Milam County, Texas, which was subsequently renewed.



On January 15, 1997, Respondent executed a conduct surety bond for the premises known as Club Lovell's, 101 Mulberry Street, Rockdale, Milam County, Texas in the amount of \$5,000.00 as required by Section 11.11 of the Code. By the terms of this bond, it became effective on the date of the issuance of the permit, which was February 10, 1997.

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

On December 3, 1997, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 576792, regarding at least three violations of the Code. The waiver agreement stated that on November 30, 1997, Respondent permitted consumption during prohibited hours, possessed distilled spirits, and had an employee intoxicated on the licensed premises, in violation of Sections 61.71(a)(18), 61.71(a)(9), and 11.61(b)(13) or 104.01(5) of the Code, respectively. The agreement contained the following language:

My name is Nancy Mae Johnson. I am the owner. I neither admit nor 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/ canceled unless the licensee or permittee elects to pay a civil penalty in lieu of a suspension. A civil penalty in the amount of \$2250.00 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 question. 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 December 19, 1997. The Order stated that the violations, as stated in the agreement and waiver of hearing, did occur. The Order adopted the above described waiver of hearing and assessed the penalty of suspension of Respondent's permit for a period of 15 days beginning on January 14, 1998, unless the permittee paid a civil penalty in the amount of \$2250.00 on or before December 31, 1997. Further, the Order contained an addendum, notifying Respondent that the order became final and enforceable in 21 days from the date the order was signed (December 19, 1997), unless Respondent filed a motion for rehearing with the Commission. No motion for rehearing was ever filed with the Commission in this matter.

1. Respondent's Testimony. Respondent testified as a witness for the Commission, and in her own behalf. She testified that she did receive the Commission's "Notice of Hearing" more than ten days prior to the hearing on the merits. In her own behalf, she testified that because she did not pay John Lovell Galbert a salary (in 1997), he was not an employee (on November 30, 1997). Respondent tendered for consideration the written statement of Henry Wobus, described as the person who is responsible for "doing (Respondent's) taxes," stating that Respondent has not had any employees since 1993.

2. **John Lovell Galbert's Testimony.** John Lovell Galbert testified for Respondent, stating that the Respondent and he were both arrested (on November 30, 1997), and that he was not employed by Respondent at that time.

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 §6.01 (Vernon 1995). "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 §1.04(11)(Vernon 1995). 16 TEX. ADMIN. CODE §33.24(j)(1998) 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 at least three violations of the Code since September 1, 1995.

Administrative finality in a contested case, when a motion for rehearing is not filed, would be on the expiration of the period for filing a motion for rehearing, or on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered. See the Commission's rule at 16 TEX. ADMIN. CODE §37.43 (1998) and TEX. GOV'T CODE ANN. §2001.144(a)(1) and (4)(Vernon 1999) [formerly TEX. REV. CIV. STAT. ANN. art. 6252-13a, §16(c)]. Unless the Commission Administrator extends the period of time for filing the motion for rehearing, a motion for rehearing must be filed within 15 days after the date of the rendition of a final decision or order. See 16 TEX. ADMIN. CODE §37.44(b) and (c)(1998).

PROPOSED FINDINGS OF FACT

1. On February 10, 1997, the Commission issued a Wine and Beer Retailer's Permit, BG-406896, to Respondent for the premises known as Club Lovell's, 101 Mulberry Street, Rockdale, Milam County, Texas. On January 15, 1997, Respondent, executed a conduct surety bond for the premises known as Club Lovell's, 101 Mulberry Street, Rockdale, Milam County, Texas in the amount of \$5,000 as required by Section 11.11 of the Code. By the terms of this bond, it became effective on the date of the issuance of the permit, which was February 10, 1997.

2. The hearing was convened on June 8, 1999, at the hearings' facility of the State Office of Administrative Hearings, 4201 Lake Shore Drive, Village Green Center, Suite F, Waco, Texas. Respondent appeared in person, and represented herself. Gayle Gordon, Assistant Attorney General, appeared in person to represent the Staff. Evidence and argument were heard, and the record was closed at the conclusion of the hearing.

3. There were no contested issues of notice or jurisdiction in this proceeding, and Respondent did receive proper and timely notice of the hearing from the Commission in a notice of hearing, dated

March 16, 1999. The notice was timely received by Respondent at P.O. Box 1631, Rockdale, Texas 76567, as evidenced by Respondent's testimony, and by the notice's attached Domestic Return Receipt card, No. P419583264, signed by Respondent, stamped received by the Commission's legal division, March 18, 1999.

4. Respondent did receive proper and timely notice of the hearing from the State Office of Administrative Hearings, in its Pre-Trial Order No. 1, Setting Hearing and Pre-Hearing Conference & Establishing Requirements for Participation, dated March 17, 1999. This order was timely received by Respondent at P.O. Box 1631, Rockdale, Texas 76567, as evidenced by the order's attached Domestic Return Receipt card, No. Z 419438017, signed by Respondent, and postmarked March 18, 1999.

5. On December 3, 1997, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 576792, regarding three violations of the Code. By signing the waiver agreement, Respondent did not deny that: on November 30, 1997, Respondent permitted consumption during prohibited hours, possessed distilled spirits, and had an employee intoxicated on the licensed premises, in violation of Sections 61.71(a)(18), 61.71(a)(9), and 11.61(b)(13) or 104.01(5) of the Code, respectively. Respondent waived her right to a hearing to contest these violations of the Code and acknowledged that her permit would be suspended or canceled by the Commission unless she paid a civil penalty. By her signature, she acknowledged that should she fail to timely pay the civil penalty, her license suspension would begin January 14, 1998, and that the forfeiture of any related conduct surety bond could result.

6. On December 19, 1997, the Commission Administrator entered an order finding Respondent had committed three violations of the Code consistent with Respondent's admissions found in Findings of Fact No. 5, and stating that should Respondent fail to timely pay the civil penalty, her license suspension would begin January 14, 1998. Further, with this order, Respondent was notified that the order became final and enforceable in 21 days from the date the order was signed, unless Respondent filed a motion for rehearing with the Commission. No motion for rehearing was ever filed with the Commission in this matter, and the order became final on January 9, 1998.

7. 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 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 hearing 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. §§2003.021(b) and 2003.042(6) (Vernon 1999).

3. As referenced in Proposed Findings of Fact Nos. 2-4, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN §§2001.051 and 2001.052 (Vernon 1999).

4. Based upon Proposed Finding of Fact No. 1, Respondent holds a Wine and Beer Retailer's Permit, BG-406896, and posted a conduct surety bond in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 (1998) and TEX. ALCO. BEV. CODE §11.11 (Vernon 1995 and Vernon Supp. 1999).

5. Administrative finality in a contested case, when a motion for rehearing is not filed, would be on the expiration of the period for filing a motion for rehearing; or on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is signed or later than the 20th day after the date the order was rendered. See the Commission's rule at 16 TEX. ADMIN. CODE §37.43 (1998) and TEX. GOV'T CODE ANN. §2001.144(a)(1) and (4)(Vernon 1999)[formerly TEX. REV. CIV. STAT. ANN. art. 6252-13a, §16(c)]. Unless the Commission Administrator extends the period of time for filing the motion for rehearing, a motion for rehearing must be filed within 15 days after the date of the rendition of a final decision or order. See 16 TEX. ADMIN. CODE §37.44(b) and (c)(1998).

6. Based on Proposed Findings of Fact Nos. 5-7 and Proposed Conclusion of Law No. 5 the violations described above are final adjudications, the facts of which are not to be re-litigated in the context of the instant case.

7. Based upon Proposed Findings of Fact Nos. 5-7, Respondent violated 16 TEX. ADMIN. CODE §33.24 (1998) and TEX. ALCO. BEV. CODE §11.11 (Vernon 1995 and Vernon Supp. 1999) by violating a Commission rule and law of the State of Texas relating to alcoholic beverages while holding Wine and Beer Retailer's Permit BG-406896 for the premises known as Club Lovell's, 101 Mulberry Street, Rockdale, Milam County, Texas, issued by the Commission, having three violations of the Code since September 1995.

8. Based on Proposed Findings of Fact Nos. 5-7, the conduct surety bond executed by Respondent should be forfeited to the State.

SIGNED and entered this 6th day of July, 1999.



SUZAN MOON SHINDER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS