

# State Office of Administrative Hearings

Shelia Bailey Taylor  
Chief Administrative Law Judge

June 28, 1999

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

ORIGINAL VIA CERTIFIED MAIL No. Z419438120

**RE: Docket No. 458-99-0488; Texas Alcoholic Beverage Commission vs. Olive Inc., d/b/a The Martini Factory (TABC Case No. 582770)**

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 Matthew C. McClinton, attorney for Olive Inc., d/b/a The Martini Factory, Respondent. 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,

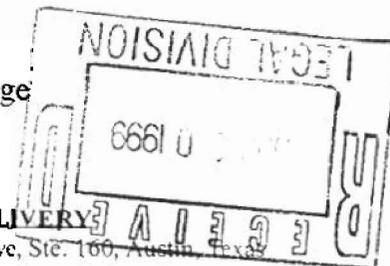


Suzan Moon Shinder  
Administrative Law Judge

SMS:me  
Enclosure

cc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **FAX DELIVERY**  
Gayle Gordon, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Ste. 160, Austin, Texas 78731 - **CERTIFIED MAIL NO. Z419438121, RETURN RECEIPT REQUESTED**  
Matthew C. McClinton, attorney for Olive, Inc. d/b/a The Martini Factory, Dow, Howell & McClinton, L.L.P., P.O. Box 23224, Waco, Texas 76702-3224 - **CERTIFIED MAIL NO. Z419438122, RETURN RECEIPT REQUESTED**

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



DOCKET NO. 458-99-0488

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

vs.

OLIVE, INC.  
D/B/A THE MARTINI FACTORY  
PERMIT NOS.MB-267911 & LB-267912  
MCLENNAN COUNTY, TEXAS  
(TABC CASE NO. 582770)

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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 Olive, Inc., d/b/a The Martini Factory (Respondent), in compliance with Section 11.11 of the Texas Alcoholic Beverage Code (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. The Respondent contended that this penalty was too harsh and requested a decision that would allow his \$5000.00 conduct surety bond to be released to him. This proposal for decision agrees with the Staff's recommendation that Respondent's conduct surety bond be forfeited.

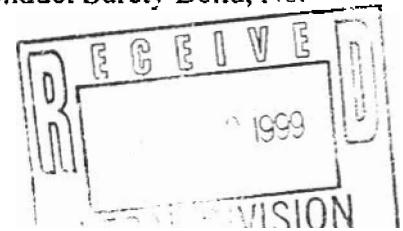
**I. Jurisdiction, Notice, and Procedural History**

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, in Waco, Texas. Respondent appeared by and through its attorney of record, Matthew McClinton. Respondent's principal, the president of Olive, Inc., Michael Spehr, testified in Respondent's behalf. The Commission appeared by and through its Assistant Attorney General, 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 the 23rd day of July, 1996, the Commission issued a Mixed Beverage Permit, MB-267911, to Respondent for the premises known as Olive Inc., doing business as The Martini Factory, 600 North New Road, Waco, McLennan County, Texas. This permit has been continuously renewed since that date. As required of all applicants and holders of such permits, by Section 11.11 of the Code, the Respondent executed the related Conduct Surety Bond, No.



422440148, in the amount of \$5000.00.<sup>1</sup>

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

On November 25, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 578532, regarding two violations of the Code. The waiver agreement stated that on or about August 31, 1997, and on or about August 2, 1997, Respondent, or his agent, servant, or employee conducted business in a place or manner which warranted cancellation or suspension of his permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, by delivering a methamphetamine/ amphetamine, on the licensed premises, in violation of Section 481.002(5) of the Texas Health and Safety Code, which warranted suspension or cancellation under Section 11.61(b)(2) of the Code and Section 35.41 of the rules of the Texas Alcoholic Beverage Commission. In this agreement, Respondent did not admit or deny the violations as stated above, waived a hearing in the matter, and accepted the penalty assessed. Respondent agreed that the above referenced permit be suspended for a period of twenty-five days beginning February 1, 1999, unless a civil penalty in the amount of \$3,750.00 was paid on or before January 20, 1999. The agreement also contained the following language:

Respondent agrees that this agreement becomes final and enforceable on the date the Order is signed, and acknowledges that 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 a "Waiver Order" on November 25, 1998. This order stated that Respondent had violated Section 11.61(b)(2) of the Texas Alcoholic Beverage Code, and Section 35.41 of the Texas Alcoholic Beverage Commission Rules. Further, in accordance with the agreed waiver, the "Waiver Order" assessed the penalty of suspension of Respondent's permit for a period of 25 days beginning on February 1, 1999, unless Respondent paid a civil penalty in the amount of \$3,750.00 on or before January 20, 1999.

On November 25, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 575457, regarding nine violations of the Code. The waiver agreement stated that on or about August 8, 1997; September 5, 1997; November 5, 1997; April 9, 1998; September 3, 1998; September 30, 1998; and October 16, 1998, Respondent, or his agent, servant, or employee, gave checks to various distributors, which were returned by the Drawee for insufficient funds, in violation of Section 61.73(b) of the Code.

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<sup>1</sup>The Conduct Surety Bond at issue was not tendered for consideration, and facts regarding Respondent's conduct surety bond are based on Commission's Exhibit No. 1, and the sworn testimony of Michael Spehr, who is president and principal for Olive, Inc., d/b/a The Martini Factory.

In this agreement, Respondent did not admit or deny the violations as stated above, waived a hearing in the matter, and accepted the penalty assessed. Respondent agreed that the above referenced permit be suspended for a period of three days beginning January 28, 1999, unless a civil penalty in the amount of \$450.00 was paid on or before January 20, 1999. The agreement also contained the following language:

Respondent agrees that this agreement becomes final and enforceable on the date the Order is signed, and acknowledges that 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 a "Waiver Order" on November 25, 1998. This order stated that Respondent had violated Section 61.73(b) of the Code, as described in the "Agreement and Waiver of Hearing." Further, in accordance with the agreed waiver, the "Waiver Order" assessed the penalty of suspension of Respondent's permit for a period of three days beginning on January 27, 1999, unless Respondent paid a civil penalty in the amount of \$450.00 on or before January 20, 1999.

#### **IV. Forfeiture of Conduct Surety Bond**

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, the holder violated three provisions of the Code since September 1, 1995. Specifically; all applicants for, and holders of, a permit under chapter 25, 28 (Mixed Beverage Permit), or 32 of the Code must have on file, with the Commission, a conduct surety bond, in the amount of \$5000.00, conditioned on the applicant's or holder's conformance with alcoholic beverage law, in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE §11.11 (Vernon 1995 and Vernon Supp. 1999). 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). 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. "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).

#### **PROPOSED FINDINGS OF FACT**

1. On the 23rd day of July, 1996, the Commission issued a Mixed Beverage Permit, MB-267911, to Respondent for the premises known as Olive Inc., doing business as The Martini Factory, 600 North New Road, Waco, McLennan County, Texas. This permit has been continuously renewed since that date. As required of all applicants and holders of such permits, by Section 11.11 of the Code, the Respondent executed a related Conduct Surety Bond, No. 422440148, in the amount of \$5000.00.

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 by and through its attorney of record, Matthew McClinton. Respondent's principal, the president of Olive, Inc., Michael Spehr, testified in Respondent's behalf. The Commission appeared by and through its Assistant Attorney General, Gayle Gordon. 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 April 13, 1999. The notice was properly sent to Respondent at the address provided in Proposed Finding of Fact No. 1, as evidenced by the notice's Certificate of Service, the attached Receipt for Certified Mail, No. P419-581-358, and the Domestic Return Receipt card, No. P419-581-358.

4. 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.

5. Respondent's \$5000.00 Conduct Surety Bond, No. 422440148, for the premises known as Olive Inc., doing business as The Martini Factory, having Mixed Beverage Permit, MB-267911, is effective, and has not been released.

6. On November 25, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 578532, regarding two violations of the Code. By signing this waiver agreement, Respondent did not deny that: on or about August 31, 1997, and on or about August 2, 1997, Respondent, or his agent, servant, or employee conducted business in a place or manner which warranted cancellation or suspension of his permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, by delivering a methamphetamine/ amphetamine, on the licensed premises, in violation of Section 481.002(5) of the Texas Health and Safety Code, which warranted suspension or cancellation under Section 11.61(b)(2) of the Code and Section 35.41 of the rules of the Texas Alcoholic Beverage Commission. Respondent waived Respondent's right to a hearing to contest these violations of the Code and acknowledged that Respondent's permit would be suspended or canceled by the Commission unless Respondent paid a civil penalty. By Respondent's signature, Respondent further acknowledged that the forfeiture of any related conduct surety bond could result.

7. As a result of this waiver agreement, the Commission Administrator entered a "Waiver Order" on November 25, 1998. This order found that Respondent had committed the two violations of the Code, consistent with Respondent's admissions found in Proposed Finding of Fact No. 6, above.

8. On November 25, 1998, Respondent signed an "Agreement and Waiver of Hearing," in Docket Number 575457, regarding nine violations of the Code. By signing this waiver

agreement, Respondent did not deny that on or about August 8, 1997; September 5, 1997; November 5, 1997; April 9, 1998; September 3, 1998; September 30, 1998; and October 16, 1998, Respondent, or his agent, servant, or employee, gave checks to various specified distributors, which were returned by the Drawee for insufficient funds, in violation of Section 61.73(b) of the Code. Respondent waived Respondent's right to a hearing to contest these violations of the Code and acknowledged that Respondent's permit would be suspended or canceled by the Commission unless Respondent paid a civil penalty. By Respondent's signature, Respondent further acknowledged that the forfeiture of any related conduct surety bond could result.

9. As a result of this waiver agreement, the Commission Administrator entered a "Waiver Order" on November 25, 1998. This order found that Respondent had committed the nine violations of the Code, consistent with Respondent's admissions found in Proposed Finding of Fact No. 8, above.

10. 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 1998).

3. As referenced in Proposed Findings of Fact Nos. 2, 3, and 4, the parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN §§2001.051 and 2001.052 (Vernon 1998).

4. Based upon Proposed Findings of Fact Nos. 1 and 5, Respondent holds a Mixed Beverage Permit, MB-267911, for the premises known as Olive Inc., doing business as The Martini Factory, and posted the related Conduct Surety Bond, No. 422440148, in accordance with the requirements set forth in 16 TEX. ADMIN. CODE §33.24 and TEX. ALCO. BEV. CODE §11.11 (Vernon 1995 and Vernon Supp. 1999), which has not been released.

5. Based upon Proposed Findings of Fact Nos. 6-10, Respondent violated 16 TEX. ADMIN. CODE §33.24 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 a Mixed Beverage Permit, MB-267911, for the premises known as Olive Inc., doing business as The Martini Factory, issued by the Commission, having at least three violations of the Code since September 1995.

6. Based on Proposed Findings of Fact Nos. 6-10, and Proposed Conclusions of Law Nos. 4 and 5, the conduct surety bond executed by Respondent should be forfeited to the State.

SIGNED and entered this 28<sup>th</sup> day of June, 1999.



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SUZAN MOON SHINDER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS