DOCKET NO. 582618

IN RE RICHARD ROMAN GAONA,	§	BEFORE THE
ET AL D/B/A BRINDIS BAR	§	
PERMIT NO. BG407984	§	
	§	TEXAS ALCOHOLIC
	§	
HIDALGO COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0299)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 30th day of October 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Edel P. Ruiseco. The hearing convened on March 6, 2000 and adjourned June 16, 2000. Administrative Law Judge Earl J. Corbitt made and filed a Proposal For Decisión containing Findings of Fact and Conclusions of Law on September 28th, 2000. This Proposal For Decision 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.

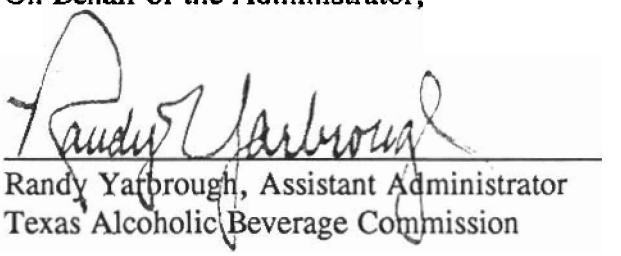
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of $5,000.00 be **FORFEITED.**

This Order will become final and enforceable on November 20, 2000, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 30th day of October, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

KGG/vr

The Honorable Earl J. Corbitt
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Richard R. Gaona
RESPONDENT
d/b/a Brindis Bar
506 S. 12th Street
McAllen, Texas 78501
VIA CERTIFIED MAIL Z 473 042 796
& VIA FACSIMILE (956) 682-0028

Gayle Gordon
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

State Office of Administrative Hearings

SEP 2 8

Shelia Bailey Taylor
Chief Administrative Law Judge
September 28, 2000

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

HAND DELIVERY

RE: Docket No. 458-00-0299; *TABC vs. Richard Roman Gaona, ET AL D/B/A Brindis Bar, BG-407984*

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, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Richard Roman Gaona representing Brindis Bar (Respondent). For reasons discussed in the Proposal for Decision, this proposal finds the Respondent's conduct surety bond should be forfeited.

Pursuant to TEX. GOV'T CODE ANN. §2001.062 (Vernon 2000), 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,

for Earl Corbitt
Administrative Law Judge

EC\rk
Enclosure
xc: Gayle Gordon, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - **VIA HAND DELIVERY**
Richard R. Gaona,506 South 12th Street,McAllen Texas 78501-**VIA REGULAR U.S. MAIL**
Rommel Corro, Docket Clerk, *State Office of Administrative Hearings*- **VIA HAND DELIVERY**

William P. Clements Building
Post Office Box 13025 ◆ 300 West 15th Street, Suite 502 ◆ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994

SOAH DOCKET NO. 458-00-0299

TEXAS ALCOHOLIC BEVERAGE COMMISSON	§	BEFORE THE STATE OFFICE
	§	
VS.	§	OF
RICHARD ROMAN GAONA, ET AL D/B/A BRINDIS BAR BG-407984	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Richard Roman Gaona, et al. d/b/a Brindis Bar (the 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 the matters had been settled with TABC and that a representative of TABC had told them no action would be taken beyond that set out in the settlement agreement. 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 March 6, 2000, at the office of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Staff Attorney Gayle Gordon represented TABC. The Respondent appeared and was represented by Richard Roman Gaona. Edel P. Ruiseco, Administrative Law Judge (ALJ), presided. Following the receipt of evidence, ALJ Ruiseco recessed the hearing to April 20, 2000, to allow the Respondent to obtain a statement from TABC Agent Amaro Tijerina in support of the Respondent's position. The record was ordered closed on May 15, 2000. On May 18, 2000, a post-hearing telephone conference convened at which the Respondent was given additional time to obtain a statement from Agent Tijerina. On June 5, 2000, another post-hearing conference convened. No additional relevant evidence was submitted. The record closed on June 16, 2000.

On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt to prepare the proposal for decision. The undersigned ALJ has reviewed the entire record including the audio tape of the hearing and the exhibits received at the hearing.

The notice of hearing, dated February 2, 2000, was sent, by certified mail, return receipt quested, to the Respondent at 506 South 12th Street, McAllen, Texas. The Respondent received the notice letter on February 7, 2000. No party challenged notice, jurisdiction, or venue. TABC and SOAH 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 (the Staff) offered documentary evidence from the TABC files. Those documents show:

(a) On February 10, 1997, the 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) Wine and Beer Retailer's Permit, Number BG-407984, was issued to Richard Roman Gaona and Gloria Sanora (sic) Parra Gaona dba Brindis Bar on February 24, 1997. The permit was subsequently renewed as required.

(c) On October 10, 1997, November 14, 1997, and August 22, 1998, the Respondent was issued a citation for alleged violations of the Code.

(d) On November 5, 1997, December 12, 1997, and September 11, 1998, 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 November 5, 1997, waiver document listed the alleged violation as delivery to an intoxicated person; the December 12, 1997, waiver document listed the alleged violation as delivery of an alcoholic beverage to an intoxicated person; and the September 11, 1998, waiver document listed the alleged violation as purchase of alcoholic beverages from another retailer for resale.

(f) On November 17, 1997, December 19, 1997, and September 14, 1998, respectively, 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 November 17, 1997, Order assessed a seven day suspension of the permit number BG-407984 unless the Respondent paid a $1,050.00 penalty before December 24, 1997. The December 19, 1997, Order assessed a ten day

suspension of the same permit unless the Respondent paid a $1,500.00 penalty before January 14, 1998. The September 14, 1998, Order assessed a three day suspension of the same permit unless the Respondent paid a $450.00 penalty before October 28, 1998.

Richard Roman Gaona testified he was informed by TABC Agent Amaro Tijerina during discussions related to the citation issued on August 22, 1998, that his signing the agreement and waiver form would not result in additional penalties. According to Mr. Gaona, he and Agent Tijerina discussed whether such signing would result in forfeiture of the Respondent's conduct surety bond. Mr. Gaona testified Agent Tijerina assured him no such forfeiture would occur. According to Mr. Gaona, he accepted the penalties assessed "under protest" and told Agent Tijerina that he wanted a hearing on the matter.

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.

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

> (1) When a license or permit is cancelled, 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 Orders issued on November 17, 1997, December 19, 1997, and September 14, 1998, each amounts to a "final adjudication." The Orders are final. In addition to being final, each Order finds the Respondent "has agreed that the violation of law did occur . . . The agreed violations are as stated in the agreement and waiver of hearing." The Orders contain a warning to the Respondent that the Order will become final and enforceable 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. Neither accepting the penalties "under protest" nor making a verbal

request to a TABC employee suffices as a motion for rehearing. The undersigned ALJ agrees with the Staff's position that the Orders issued on November 17, 1997, December 19, 1997, and September 14, 1998, each became a final adjudication that the Respondent had violated the Code when the Respondent failed to seek a rehearing. The instant hearing is not the proper forum to challenge the findings contained in the Order.

Mr. Gaona asserted the TABC agent who negotiated the agreement and waiver forms promised there would be no further adverse action by TABC. No one offered any evidence that the TABC representative who negotiated the agreement had any authority to waive further action by TABC. The Respondent was given an opportunity and additional time to obtain evidence favorable to his position. The Respondent submitted oral argument but no relevant evidence. The argument essentially restates his position that he was uninformed about the possibility of having the conduct surety bond forfeited.

Having no evidence of the authority of the representative, the ALJ has no grounds for finding that TABC is bound by the statement of its employee. The written agreements between the parties, which are in evidence, state that the Respondent's conduct surety bond may be in jeopardy. The evidence contains no written agreement to the contrary.

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. FINDINGS OF FACT

1. Richard Roman Gaona, et al. dba Brindis Bar (the Respondent) is the holder of Wine and Beer Retailer's Permit No. BG-407984 issued by the Texas Alcoholic Beverage Commission (TABC) on February 24, 1997.

2. On February 10, 1997, the Respondent executed a conduct surety bond in the amount of $5,000.00 payable to TABC.

3. On February 2, 2000, 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. The Respondent timely received the notice letter.

The hearing on the merits was convened on March 6, 2000, at the offices of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Staff Attorney Gayle Gordon represented the Staff. The Respondent appeared and was represented by Richard Roman Gaona. Edel P. Ruiseco, Administrative Law Judge (ALJ) presided. The Respondent was given additional time to obtain evidence in support of its position and the hearing subsequently closed on June 16, 2000.

5. On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt to write the proposal for decision.

6. On November 5, 1997, the Respondent signed an "Agreement and Waiver of Hearing" regarding an alleged violation of the Texas Alcoholic Beverage Code (the Code), for which TABC entered an Order finding the Respondent committed the violation and imposed a seven day suspension or a civil penalty of $1,050.00 on the Respondent.

7. On December 12, 1997, the Respondent signed an "Agreement and Waiver of Hearing" regarding an alleged violation of the Code, for which TABC entered an Order finding the Respondent committed the violation and imposed a ten day suspension or a civil penalty of $1,500.00 on the Respondent.

8. On September 11, 1998, the Respondent signed an "Agreement and Waiver of Hearing" regarding an alleged violation of the Code, for which TABC entered an Order finding the Respondent committed the violation and imposed a three day suspension or a civil penalty of $450.00 on the Respondent.

9. The Respondent did not timely file a motion for rehearing with TABC and the Orders described in Findings of Fact Nos. 6, 7 and 8 became final.

10. 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 28th day of September, 2000.

EARL A. CORBITT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

L:\GROUPS\ISSUED\458\00-0299\458-00-0299.pfd.wpd\EC