DOCKET NO. 583121

IN RE JAMES R. McCORMICK	§	BEFORE THE
D/B/A CROUCH'S DRIVE IN	§	
PERMIT NO. BG422000	§	
	§	TEXAS ALCOHOLIC
	§	
GREGG COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-99-2632)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 27th day of July 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard Farrow. The hearing convened on December 14, 1999 and adjourned December 29, 1999. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on June 30, 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. Petitioner has filed exceptions to the Proposal for Decision

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, and Exhibits, adopts Petitioner's exceptions that Section 11.11 (d) applies rather than Section 11.11(b), thereby denying the Findings of Fact and Conclusions of the Administrative Law Judge, which are contained in the Proposal For Decision.

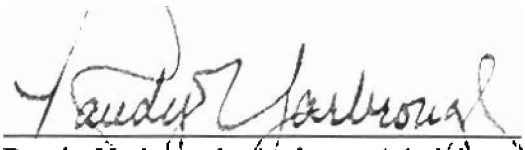
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Respondent's conduct surety bond in the amount of $5,000.00 be **FORFEITED**.

This Order will become final and enforceable on August 17, 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 27th day of July, 2000.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

TEG/bc

The Honorable Richard Farrow
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (903) 534-7076

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

Odis Hill
ATTORNEY FOR RESPONDENT
211 N. Center
Longview, Texas 75606
VIA FACSIMILE (903) 758-3239

James R. McCormick
1311 N. Whatley Rd.
White Oak, Texas 75693
VIA REGULAR MAIL

Timothy E. Griffith
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Longview District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

June 30, 2000

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

VIA CERTIFIED MAIL Z 186 432 027
RETURNED RECEIPT REQUESTED

RE: Docket No. 458-99-2632; Texas Alcoholic Beverage Commission vs. James R. McCormick d/b/a Crouch's Drive In (Permit No. BG-422000) (TABC Case No. 583121)

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 Timothy E. Griffith, attorney for Texas Alcoholic Beverage Commission, and to Odis Hill, attorney for James R. McCormick d/b/a Crouch's Drive In. For reasons discussed in the proposal, based on Findings of Fact Nos. 1-4, the Assignment (For Conduct Surety Purposes Only) of the certificate of deposit did not contain on its face language required that the Assignment is payable to the state in the event that the permit is revoked and therefore the Assignment may not be forfeited based on TEX. ALCO. BEV. CODE ANN. § 11.11 nor on Texas Alcoholic Commission Rules § 33.24; and based on Findings Nos. 1-15 and Conclusion Nos. 4 and 5 forfeiture of the Assignment (For Conduct Surety Purposed Only) of the certificate of deposit is not warranted.

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,

Richard Farrow

Richard Farrow
Administrative Law Judge

RF:tmn
Enclosure: 1

xc: Shanee Woodbridge, Docket Clerk, State Office of Administrative Hearing - **REGULAR MAIL**
Timothy E. Griffith, Attorney for the Texas Alcoholic Beverage Commission, Texas Alcoholic Beverage Commission - **CERTIFIED MAIL NO. Z 186 432 028, RETURN RECEIPT REQUESTED**
Odis Hill , Attorney at Law, James R. McCormick d/b/a Crouch's Drive In, 211 N. Center Longview, Texas 75606 - **CERTIFIED MAIL NO. Z 186 432 029, RETURN RECEIPT REQUESTED**

Commerce Square
3323 S. SW Loop 323 ◆ Tyler, Texas 75701
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SOAH DOCKET NO. 458-99-2632

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
	§	
VS.	§	
	§	OF
	§	
JAMES R. MCCORMICK	§	
D/B/A CROUCH'S DRIVE IN	§	
PERMIT NO. BG-422000	§	
GREGG COUNTY, TEXAS	§	
(TABC CASE NO. 583121)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission, (TABC), brought this action against the Respondent, James R. McCormick, seeking to forfeit Respondent's conduct surety bond for violations of the Texas Alcoholic Beverage Code or Texas Alcoholic Beverage Commission Rules. There was no dispute concerning the violations but there was dispute as to the bond ownership and whether the TABC had the authority to forfeit the bond. This proposal recommends that the bond not be forfeited.

I. Procedural History

On December 1, 1999, TABC sent notice of hearing to James R. McCormick through his attorney of record. The hearing was scheduled and commenced on December 14, 1999. Appearing for the Petitioner was Timothy Griffith, staff attorney. James McCormick appeared by Odis Hill, attorney. Presiding was Richard Farrow, Administrative Law Judge with the State Office of Administrative Hearings. Also appearing was Billy Jack McCormick, Respondent's son.

Objection to the notice was made by Respondent's attorney. It was shown that Respondent had died July 4, 1999. It was further shown that the bond the Staff was seeking to forfeit was a certificate of deposit in lieu of surety bond. Respondent objected that the funds on deposit belonged to Respondent and that the ownership of such funds passed immediately at the time of the death of Respondent and that Billy Jack McCormick should be substituted as a party to the action. Billy Jack McCormick testified that he was the sole heir to his father's estate. The objection made concerned Rule 152 of the Texas Rules of Civil Procedure. The Administrative Law Judge ruled that, as heir, Billy Jack McCormick had an ownership interest in the funds on deposit the subject of this cause and that prior to the State's taking the property he was entitled to notice and a right to be heard. The ALJ ruled that Billy Jack McCormick would be added as a party and would be entitled to notice.

The hearing was reset on the record to December 29, 1999, at 1:00 p.m. Mr. Billy Jack McCormick was present and received notice of the reset hearing from the Administrative Law Judge when announced on the record. Also on the record, a copy of the written notice was delivered to Billy Jack McCormick. All parties agreed that such reset and notice was sufficient notice to Billy Jack McCormick.

The ALJ then ruled that since James R. McCormick was deceased, his attorney, Odis Hill, was relieved of any further duty of representation in this matter. Mr. Hill accepted such ruling with the stated understanding that in the event Mr. Billy Jack McCormick retained his services he would be allowed to represent him in the matter. The hearing was adjourned until December 29, 1999.

The hearing reconvened on December 29, 1999, and Mr. Hill announced that Billy Jack McCormick had retained his services and Mr. Hill was appearing as Billy Jack McCormick's attorney. Billy Jack McCormick appeared in person. Appearing for the Staff was Timothy Griffith, staff attorney for the Texas Alcoholic Commission. No further objection was made as to notice or jurisdiction and the hearing was held before Richard Farrow, ALJ. The evidence was received, argument made, the hearing concluded, and the record closed that date.

II. Discussion of the Evidence

Staff introduced certified copies of Respondent's Wine and Beer Retailer's permit, BG-422000 issued by the Texas Alcoholic Beverage Commission on October 24, 1997, which would expire October, 23, 1998. Also introduced was a copy of an instrument titled "Assignment (For Conduct Surety Purposes Only)" in which James R. McCormick assigned a certain described certificate of deposit to the Texas Alcoholic Beverage Commission. The instrument states that in the event the holder of permit or license violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the certificate of deposit shall be payable to the state. A copy of the certificate of deposit in the original sum of $5,000.00 was also introduced.

On August 25, 1998, the Respondent entered into an agreement with the Texas Alcoholic Beverage Commission to cancel his license or permit due to alleged violations of §§ 69.13 and 61.71(f) of the TEX. ALCO. BEV. CODE alleged to have occurred April 4, 1998, on the licensed premises. The Respondent waived hearing regarding those violations and on August 27, 1998, an Order was signed by the Assistant Administrator of the Texas Alcoholic Commission finding that the violations occurred and that the Respondent's license or permit be canceled.

On February 16, 1999, Petitioner sent, to Respondent, a letter stating its intent to forfeit the conduct surety bond because the permit was canceled by the Texas Alcoholic Beverage Commission. Respondent requested a hearing to contest such forfeiture.

Respondent argued that the statute set out certain language required to be on the face of the bond, that was not on the printed form of the bond, and that, therefore, the bond was not enforceable

and not subject to forfeiture. Specifically, Respondent cites § 61.13 of the Texas Alcoholic Beverage Code which states "... (b) A surety bond required under this section shall contain the following statements on the face of the bond: (1) that the holder of the license will not violate a law of the state relating to alcoholic beverages or a rule of the commission; and (2) that the holder of the license agrees that the amount of the bond shall be paid to the state if the license is revoked or on final adjudication that the holder violated a provision of this code; ...". While Respondent cites § 61.17, the more applicable statute, § 11.11 dealing with Wine and Beer Retailer's permit contains the same language.

Respondent's position is that the required language concerning the bond being payable to the state in the event that the license is revoked was not on the face of the bond and, therefore, the bond should not be forfeited because revocation of the license was not specifically set out on the face of the bond as an event that would cause forfeiture.

Respondent also argues that the statute uses the term "revoke" and the Respondent's license was not revoked but was "canceled" and that the forfeiture could not occur unless the license was "revoked." The terms cancel and revoke are not defined separately in the Rules or Code but are used interchangeably. There appears to be no particular meaning assigned to these terms other than the normal usage and, as such, they are not "terms of art" to be given other than usual meaning. As such, the terms have the same common meaning.

The Respondent committed two violations that had been adjudicated since September 1, 1999, as reflected in the violation history offered by Petitioner.

The Assignment (For Conduct Surety Purposes), made in lieu of a bond, as allowed by § 11.11(d)(1) of the Code, states "If the holder of this permit or license violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the certificate of deposit shall be paid to the state." The assignment does not state on its face that the amount of the certificate shall be paid to the state in the event that the permit or license is canceled or revoked.

The notice of hearing states that the conduct surety bond would be forfeited based on (1) the cancellation of the Respondent's permit or license; or (2) that the Permittee was found to have committed three or more adjudicated violations since September 1, 1995.

The thrust of the Respondent's argument is that the Assignment does not state that revocation or cancellation of the permit or license is a condition of forfeiture, as is required in Code § 11.11 (2)(b)(2) ; therefore the forfeiture should not be allowed based on cancellation. Further, the second allegation in the Notice, that Respondent had committed three or more adjudicated violations since September 1, 1999, was not proved and therefore the Petitioner may not forfeit the Assignment based on § 33.24 of the Rules.

Rule 33.24(j)(1) states that when a license or permit is canceled, or a final adjudication that the licensee or permittee has committed three or more violations of the Code since September 1,

1995, the Commission shall notify the permittee of its intent to seek forfeiture of the bond.

The Rules and the Code seem to be in conflict concerning what conditions would cause or allow forfeiture. The general rules of interpretation of statutes and rules come into play. The statute takes precedence over a rule; rules will be given effect if not in conflict with statute; rules and statutes will be interpreted to be not in conflict if a reasonable reading and application can be made that would resolve apparent conflict, as it is assumed that no conflict was intended.

Both the Rules and the Statute indicate that in the event the license or permit is canceled or revoked the bond, or assignment, is subject to forfeiture. The statute indicates this intent by the language that requires that condition be on the face of the document. The Rules state the same thing in § 33.24; that the bond will be forfeited in the event the license is canceled. The Rule does not speak to whether this condition need be stated on the face of the bond. The Rule is to give effect to the statute, to implement the statute, but not to alter the statute. It seems the intent is clear that cancellation is a cause for forfeiture of any bond and as such should be a specific condition set out on the face of the document. In light of the language in the statute, the condition should be set out in the document in order for the condition to be given effect.

The statute also requires that the document have language on its face stating that in the event of a violation of the laws or TABC Rules relating to alcoholic beverages, the bond, or assignment, shall be paid to the state. The assignment in this case has such language on the face of the document. The Rule 33.24 states that forfeiture may be sought following **three** violations of the Alcoholic Beverage Code. The seeming conflict (one or three violations?) may be resolved by considering that the Commission is given rule-making authority in order to implement the statutes, which cannot cover every situation.

The statute defines when the permittee has subjected its bond to forfeiture; it becomes payable to the state upon one violation. The rule states that the Commission charged with enforcing the statute will not seek forfeiture of the bond until three violations have been adjudicated.

There can be many reasons why the Commission would not choose to forfeit bonds based on one violation as a matter of policy. It is also conceivable that a policy of no forfeiture until three violations could have been in existence without the need of a written rule; any forfeitures brought would be based on a single violation as allowed by the statute and by the terms of the bond. By setting the policy into concrete by making a written rule, rules having basically the force of law, permittees then are encouraged to rely on the rules in their interaction with and expectations of the Commission. In the instant case, the Commission gave notice to the Respondent that it intended to forfeit the bond based on three violations, Rule 33.24. Even the Staff considers three violations the benchmark for proceeding to forfeiture. The Respondent should be reasonably allowed the same interpretation and expectation. As the Notice specifically sought forfeiture based on three violations and only two violations were shown to have occurred, forfeiture can not be had on that basis.

III. Findings of Fact

1. Respondent was the holder and owner of Wine and Beer Retailer's Permit No. BG-422000 issued by the Texas Alcoholic Beverage Commission on October 24, 1997.

2. Respondent executed an Assignment (For Conduct Surety Purposes Only) of a certain Certificate of Deposit in the original sum of $5,000.00 to the Texas Alcoholic Beverage Commission of the State of Texas.

3. The Assignment states as a condition of the assignment " If the holder of this permit or license violates a law of the state relating to alcoholic beverages or a rule of the commission, the amount of the certificate of deposit shall be paid to the state."

4. The Assignment does not state on its face that the amount of the assignment shall be paid to the state if the license is revoked.

5. On August 25, 1998, Respondent entered into an agreement whereby he neither admitted nor denied the allegations that he had committed a violation of § 69.13 and a violation of § 61.71(f) of the TEX. ALCO. BEV. CODE ANN., but agreed to waive hearings on such allegations and accept a civil penalty of cancellation of license or permit.

6. On August 27, 1998, an Order was entered finding that the Respondent had violated § 69.13 of the TEX. ALCO. BEV. CODE ANN., which was not appealed and became final 30 days later.

7. On August 27, 1998, an Order was entered finding that the Respondent had violated § 61.71(f) of the TEX. ALCO. BEV. CODE ANN, which was not appealed and became final 30 days later.

8. On August 27, 1998, an Order was entered that Respondent's license or permit be canceled, which order became final September 18, 1998.

9. On February 16, 1999, Petitioner sent a letter to Respondent advising that Petitioner would seek forfeiture of the conduct surety bond as the permit had been canceled.

10. Respondent timely requested a hearing to contest the forfeiture.

11. Respondent, James R. McCormick died on July 4, 1999.

12. Notice of Hearing was sent to Respondent's attorney on November 16, 1999.

13. Second Notice of Hearing was sent to Respondent's attorney on December 1, 1999.

14. On December 14, 1999, Billy Jack McCormick was named a party entitled to notice and was given notice orally of the date and time of the hearing and written notice of the allegations of

Petitioner's claim against the certificate if deposit assigned to TABC for conduct surety purposes only.

15. The hearing was reconvened on December 29, 1999, the evidence heard and the record was closed on that date.

IV. Conclusions of Law

1. Service of proper and timely notice was effected on the Respondent pursuant to TEX. GOV'T CODE ANN. § 2001.

2. Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 11.11.

3. The State Office of Administrative Hearings has jurisdiction over 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. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T CODE ANN. § 2003.

4. Based on Findings of Fact Nos.5-8, Respondent was finally adjudicated of two violations of the Code or Rules and the Assignment (For Conduct Surety Purposes Only) of the Certificate of Deposit is not subject to forfeiture based on TEX. ALCO. BEV. CODE ANN. § 11.11 nor on Texas Alcoholic Beverage Commission Rules § 33.24.

5. Based on Findings of Fact Nos 1-4, the Assignment (For Conduct Surety Purposes Only) of the certificate of deposit did not contain on its face language required that the Assignment is payable to the state in the event that the permit is revoked and therefore the Assignment may not be forfeited based on TEX. ALCO. BEV. CODE ANN. § 11.11 nor on Texas Alcoholic Beverage Commission Rules § 33.24.

6. Based on Findings Nos. 1-15 and Conclusion Nos. 4 and 5 forfeiture of the Assignment (For Conduct Surety Purposes Only) of the certificate of deposit is not warranted.

Signed this 30th day of June 2000.

Richard Farrow
Administrative Law Judge Presiding

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