

DOCKET NO. 587075

IN RE FERNANDO GONZALEZ	§	BEFORE THE
D/B/A NORTH 83 LOUNGE	§	
PERMIT NO. BG289535	§	
LICENSE NO. BL289536	§	TEXAS ALCOHOLIC
	§	
ZAPATA COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-0161)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 11th day of October, 2000, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Earl Corbitt. The hearing convened on May 8, 2000 and the record was closed on June 1, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 12, 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.

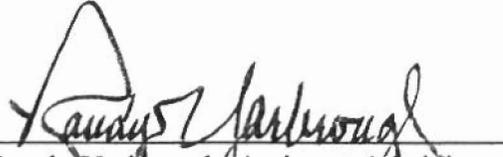
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1 of the Commission Rules, that Respondent's conduct surety bond in the amount of \$5,000.00 be **FORFEITED**.

This Order will become final and enforceable on November 1, 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 11th day of October, 2000.

On Behalf of the Administrator,

A handwritten signature in black ink, appearing to read "Randy Yarbrough", is written over a horizontal line.

Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Earl 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

Fernando Gonzalez
d/b/a North 83 Lounge
RESPONDENT
Box 4021
Zapata, Texas 78076-4021
VIA CERTIFIED MAIL/RRR NO. Z 473 042 987

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
McAllen District Office

State Office of Administrative Hearings

Shelia Bailey Taylor
Chief Administrative Law Judge

SEP 12 2000
DN 587075

September 12, 2000

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

HAND DELIVERY

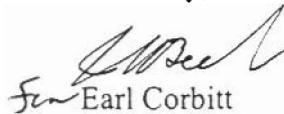
RE: Docket No. 458-00-0161; *TABC vs. Fernando Gonzalez; d/b/a North 83 Lounge, BG-289535, BL-289536*

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 Christopher Burnett, Staff Attorney representing the Texas Alcoholic Beverage Commission, and to Fernando Gonzalez, North 83 Lounge, (Respondent). For reasons discussed in the Proposal for Decision, this Proposal for Decision finds the Respondent's 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,



Earl Corbitt
Administrative Law Judge

ECrk
Enclosure

xc: Christopher Burnett, Staff Attorney, *TABC*, 5806 Mesa, Suite 160, Austin, Texas - VIA HAND DELIVERY
Fernando Gonzalez, d/b/a/ North 83 Lounge, Box 4021, Zapata, Texas 78076-4021-VIA REGULAR U.S. MAIL
Rommel Corro, Docket Clerk, *State Office of Administrative Hearings*- VIA HAND DELIVERY

SOAH DOCKET NO. 458-00-0161

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	OF
	§	
FERNANDO GONZALEZ D/B/A NORTH 83 LOUNGE BG-289535, BL-289536	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (TABC) brought this enforcement action against Fernando Gonzalez d/b/a North 83 Lounge (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 May 8, 2000, at the office of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Staff Attorney Christopher Burnett represented TABC. The Respondent appeared and was represented by its owner, Fernando Gonzalez and his wife, Amanda Gonzalez. Edel P. Ruiseco, Administrative Law Judge (ALJ), presided. Following the receipt of evidence, ALJ Ruiseco left the record open to allow the parties to submit briefs and additional evidence. The record closed on June 1, 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 January 26, 2000, was sent, by certified mail, return receipt requested, to the Respondent at Box 4021, Zapata, Texas. The Respondent acknowledged receipt of the notice letter. No party challenged notice, jurisdiction, or venue. 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.

II. EVIDENCE AND ANALYSIS

A. Evidence.

The staff of TABC (the Staff) offered documentary evidence from the TABC files. Those documents show:

(a) On October 5, 1996, 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) On June 10, 1997, the business name on the conduct surety bond was changed to reflect the business name as North 83 Lounge.

(c) Fernando Gonzalez dba North 83 Lounge was issued a renewal of Wine and Beer Retailer's Permit, BG-289535, and a renewal of Retail Dealer's On Premise Late Hours License, BL-289536, by TABC on September 8, 1999.

(d) On June 26, 1998, December 6, 1998, and September 18, 1999, the Respondent was issued a citation for alleged violations of the Code.

(e) On July 1, 1998, January 6, 1999, and September 24, 1999, 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."

(f) The July 1, 1998, waiver document listed the alleged violation as possession of distilled spirits by an employee; the January 6, 1999, waiver document listed the alleged violation as sale of alcoholic beverage to an intoxicated person; and the September 24, 1999, waiver document listed the alleged violation as sale of alcoholic beverage to an intoxicated person.

(g) On July 15, 1998, January 11, 1999, and October 5, 1999, 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 July 15, 1998 Order assessed a three day suspension of the permit number BG-289535 and license number BL-289536 unless the Respondent paid a \$450.00 penalty before August 5, 1998. The January 11, 1999 Order assessed

a seven day suspension of the same permit and license unless the Respondent paid a \$1,050.00 penalty before February 16, 1999. The October 5, 1999 Order assessed a 10 day suspension of the same permit and license unless the Respondent paid a \$1,500.00 penalty before November 3, 1999.

Fernando Gonzalez testified he runs a small business. He has been in business a long time. He complained that TABC agents find violations too frequently. He agreed violations had occurred at his establishment and that he had signed the agreement and waiver forms included in the exhibit offered by TABC. He testified he was told when he signed the agreement and waiver forms that there would not be additional penalties inflicted on his business.

Amanda Gonzalez testified the TABC agent who negotiated with her husband when he signed the agreement and waiver forms told them there would be no additional penalties.

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 canceled, 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 July 15, 1998, January 11, 1999, and October 5, 1999, 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. The undersigned ALJ agrees with the Staff's position that the Orders issued on July 15, 1998, January 11, 1999, and October 5, 1999, 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.

The witnesses 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 additional written argument but no evidence. The argument essentially restates his position that he was uninformed about the possibility of having the conduct surety bond forfeited. He further complained that small businesses are unable to afford to hire attorneys to defend them. He proposed that instead of forfeiting the conduct surety bond, he should be required to attend training in the law which governs his business.

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. Fernando Gonzalez d\B\A North 83 Lounge (the Respondent) is the holder of Wine and Beer Retailer's Permit No. BG-289535 and Retail Dealer's On Premise Late Hours License No. 289536, issued by the Texas Alcoholic Beverage Commission (TABC) on September 8, 1993.
2. On October 5, 1996, the Respondent executed a conduct surety bond in the amount of \$5,000.00 payable to TABC.
3. On January 26, 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.

4. The hearing on the merits was held on May 8, 2000, at the offices of the State Office of Administrative Hearings (SOAH), 1508 Dove Avenue, McAllen, Texas. Staff Attorney Christopher Burnett represented the Staff. The Respondent appeared and was represented by the owner, Fernando Gonzalez, and his wife Amanda Gonzalez. Edel P. Ruiseco, Administrative Law Judge (ALJ) presided.
5. On July 31, 2000, the matter was assigned to ALJ Earl A. Corbitt to write the proposal for decision.
6. On July 1, 1998, 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 three day suspension or a civil penalty of \$450.00 on the Respondent.
7. On January 6, 1999, 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 seven day suspension or a civil penalty of \$1,050.00 on the Respondent.
8. On September 24, 1999, 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 10 day suspension or a civil penalty of \$1,500.00 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 12th day of September, 2000.

Earl A. Corbitt

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